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Title: Republic of Argentina and Banco Central de la Republica Argentina, Petitioners
v.
Weltover, Inc., et al.

Docketed:
November 8, 1991

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Davis,Richard J.

Counsel for respondent: Cutler,Richard W.

Entry	Date	Note	Proceedings and Orders
1	Nov 8 1991	G	Petition for writ of certiorari filed.
3	Dec 6 1991		Brief of respondents Weltover, Inc., et al. in opposition filed.
2	Dec 11 1991		DISTRIBUTED. January 10, 1992
4	Jan 10 1992		Petition GRANTED. Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992.
			**********
11	Feb 5 1992		SET FOR ARGUMENT WEDNESDAY, APRIL 1, 1992. (2ND CASE).
12	Feb 5 1992		SET FOR ARGUMENT WEDNESDAY, APRIL 1, 1992. (2ND CASE).
5	Feb 7 1992		Record filed.
		*	Certified record U.S. Court of Appeals, Second Circuit and U.S. District Court, S. Dist. N. Y. (1 Box)
6	Feb 14 1992		Joint appendix filed.
7	Feb 14 1992		Brief of petitioners Republic of Argentina, et a. filed.
8	Feb 21 1992		CIRCULATED.
9	Feb 27 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Mar 5 1992	X	Brief amicus curiae of United States filed.
14	Mar 5 1992	X	Brief of respondents Weltover, Inc., et al. filed.
10	Mar 9 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
15	Mar 24 1992	X	Reply brief of petitioners Republic of Argentina, et al. filed.
16	Apr 1 1992		ARGUED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the relevant actions of the Republic of Argentina and Banco Central de la Republica Argentina constitute commercial activity within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

2. If so, whether those actions caused a direct effect in the United States sufficient to confer subject matter jurisdiction over this action pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

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IN THE

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OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit, entered on August 13, 1991.[1]

OPINIONS BELOW

The opinion of the Circuit Court is reported at 941 F.2d 145 (2d Cir. 1991), and is set forth in Appendix ("App.") A hereto at 1a-15a.[2] The opinion of the District Court is

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1 The caption of the case in this Court contains the names of all parties.

2 References to the Appendix to this Petition are cited herein as "App. at ___a."

reported at 753 F. Supp. 1201 (S.D.N.Y. 1991) and is set forth in Appendix B hereto, App. at 16a-29a.

JURISDICTION

A. The Petition is timely filed within ninety (90) days of the decision of the United States Court of Appeals for the Second Circuit dated August 13, 1991.

B. The decision of the Circuit Court affirmed an Order of the District Court for the Southern District of New York which denied Petitioners' motion to dismiss the complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Jurisdiction in the Circuit Court rested upon the "collateral order doctrine" (App. at 2a (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)).

C. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA" or the "Act"), provides in relevant part as follows:

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
>
> **§ 1605. General exceptions to the jurisdictional immunity of a foreign state**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the

States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§ 1603. Definitions

For purposes of this chapter—

. . . .

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

STATEMENT OF THE CASE

This action arises from Respondents' attempt to compel the Argentine government Petitioners[3] to perform under the terms of certain instruments issued in 1982. These instruments, titled Registered Bonds Denominated in United States Dollars—called "Bonods"—raised no capital, and were not used to finance the acquisition of any goods or services. Rather, they were created and issued by the Argentine government as necessary steps in its administration of the government's own obligations under a program designed to protect access to credit within Argentina in order to avoid a credit crisis within the country's private sector.

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3 The Republic is a foreign state as defined by § 1603(a) of the FSIA, and Banco Central, as Argentina's Central Bank, is an agency or instrumentality of the Republic under the Act.

The Bonods confirm on their face that they also were issued as a component of Argentina's program to regulate and stabilize its limited supply of foreign exchange, and refer potential holders to the governing Banco Central regulations. They provide for payment of interest and principal in United States Dollars, subject to and according to the provisions of Argentine government Decrees 1334 and 1603, excerpts of which are reproduced on each Bonod. Interest rates on the Bonods are linked to the London Interbank rate for Eurodollar deposits, and payment may be made through transfer on the London, Frankfurt, Zurich or New York market. The Bonods contain no language that submits to the jurisdiction of the United States courts, or implies that any law other than Argentine law will govern them. The Respondents, Panamanian and Swiss corporations[4] with no other stated contact with the United States, claim that they requested payment in New York.

The foreign exchange for which Petitioners substituted the Bonods was called for under the Argentine government's foreign exchange insurance contract program (the "FEIC"), begun in 1981. Foreign exchange—*i.e.*, currency that is internationally accepted—is critical to Argentina's economy, because its own local currency is not accepted in cross-border transactions. In order for Argentine entities or individuals to acquire goods and services from other countries or fulfill lending obligations, they must obtain dollars or other acceptable international currencies. Because of the central importance of foreign exchange to Argentina's economy, as well as the need to ensure the availability of adequate foreign exchange to fulfill sovereign obligations, inflows and outflows of foreign exchange were carefully controlled during the relevant time period by the various economic authorities, including Banco Central.[5]

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4 As alleged in Respondents' complaint, Weltover, Inc. and Springdale, Inc. are Panamanian corporations, and Bank Cantrade, A.G. is a bank corporation organized and existing under the laws of Switzerland.

5 Pursuant to Argentine law, Banco Central acts "as the State's financial agent," and its "economic, financial, monetary and currency-

Under the FEIC, Argentine borrowers would pay to Banco Central on maturity a contractually defined amount of local currency, and would receive the necessary dollars to repay their foreign debt when it matured, irrespective of intervening devaluations. Absent such a program, the government's concern was that the risks of massive devaluation would severely restrict the availability of credit to local borrowers, since neither borrowers nor lenders would have adequate security as to how much local currency would be needed to purchase the foreign exchange required to repay loans. By the time the exchange insurance contracts under the FEIC began to mature in 1982, however, Argentina's economy had deteriorated further, and the Argentine currency had suffered additional massive devaluations. These conditions had been intensified by the Republic's involvement in a war related to the Malvinas in the Spring of 1982. The result of these conditions was that the government's foreign exchange reserves were wholly insufficient to meet its various foreign exchange obligations, including its obligation to provide the dollars due under the FEIC.

The Argentine government thus determined in the Fall of 1982 that it would be necessary to adopt emergency measures in order to conserve the country's limited supply of foreign exchange, which would, as one component, use financial instruments to satisfy its own obligations to provide foreign exchange under the FEIC contracts. In order for Banco Central to accomplish this, the Ministry of Economy directed it to issue Bonods, as well as other alternative financial instruments.[6]

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exchange counsel." Organic Charter of the Central Bank of the Argentine Republic, Art. 3. Its responsibilities thus include, *inter alia*, "[r]egulation of credit within Argentina, for the purpose of fostering economic development," and "[a]dministration of the nation's reserves of gold, currency and other assets." *Id.* Banco Central's Charter expressly provides that it is prohibited from participating "directly or indirectly in any commercial . . . enterprise." *Id.* at Art. 19.

6 In order to defray the cost to Banco Central of issuing and servicing the Bonods, the Ministry determined that its own accounts would be "debi-

Because the foreign debt crisis in Argentina continued when the Bonods began to mature on May 26, 1986, the Argentine government still lacked sufficient foreign exchange to meet its obligations, including retirement of the Bonods. It was thus forced to continue its public-sector refinancing program in order to implement an ordered system of allocating scarce foreign exchange. In continuing cooperation with other sovereigns and international organizations such as the International Monetary Fund, the Republic determined that, as part of a broader program, adjustment of capital maturity dates was necessary, ultimately resulting in this lawsuit.

A. Proceedings in the District Court

The Respondents filed suit against the Petitioners in the Southern District of New York on October 18, 1989. The complaint sought immediate payment on the Bonods. The Petitioners subsequently moved the court, *inter alia*, to dismiss the complaint on the ground that subject matter jurisdiction was not present pursuant to the FSIA because the action is based upon sovereign activity of a foreign state.[7] The District Court denied the motion on January 4, 1991 (App. at 16a-29a).

The District Court held that subject matter jurisdiction was present under the commercial activity exception of the FSIA. Specifically, the District Court concluded that the action was based upon commercial activity of a foreign state, (a) notwithstanding the relationship between the Bonods and the

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ted to handle financial services and costs engendered by issuance of the securities," and provided that Banco Central could collect from those Treasury funds a so-called "commission" of .1% of the amount of the securities it issued. Decrees 1335, 1336. Banco Central's Charter provides that the national government bear such costs. Arts. 31, 33.

7 Petitioners also sought dismissal on the grounds (1) that the court lacked personal jurisdiction over the Republic and Banco Central; and (2) that the action should be dismissed under the doctrine of *forum non conveniens*. The District Court's denial of the motion to dismiss on these issues was not a subject of the subsequent appeal.

FEIC and that the issuance of the Bonods was directly linked to the government's response to the international debt crisis, and (b) despite the court's acknowledgment that "[i]nsofar as the Currency Regulations which resulted in the issuance of the Bonods precluded payment by the original debtor in dollars and altered the schedule of payments set forth in the original contracts, the Government of Argentina may not have been engaged in commercial activity" (App. at 21a). In addition, the District Court held that Petitioners' failure to make payment on the instruments as originally scheduled had a "direct effect" in the United States, as required under the Act for jurisdiction to be present. On January 30, 1991, Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit.[8]

B. The Court of Appeals Proceedings

Two questions were presented to the Circuit Court: whether the District Court erred in holding that the relevant activity of Petitioners in administering both Argentina's domestic credit policy and its foreign exchange reserves was commercial activity under the FSIA; and whether the District Court erred in holding that Petitioners' actions within Argentina caused a direct effect here. The Circuit Court affirmed the District Court's decision on both issues.

1. *Commercial Activity.* The Circuit Court applied what appears to be a *per se* rule, adopted by the Second Circuit in a recent decision which addressed debt issued by Bolivia in the course of an archetypal commercial transaction, that "issuance of debt instruments," in any context, is commercial activity and thus subject to the jurisdiction of the United States courts under the FSIA (App. at 9a (citing *Shapiro* v.

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8 The District Court's denial of Petitioners' motion to dismiss on the ground of sovereign immunity was immediately appealable under the "collateral order doctrine" established in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. at 545-47 (App. at 2a). *See, e.g., Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Compania Mexicana de Aviacion, S.A.* v. *United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (*per curiam*); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987).

Republic of Bolivia, 930 F.2d 1013, 1018 (2d Cir. 1991)). The Circuit Court declined to consider the context in which Petitioners' conduct occurred, and instead elected to "isolate the specific conduct that underlies the suit," which, in this case, it viewed as the issuance of the Bonods which obligate Petitioners to pay money (App. at 8a). Accordingly, the Circuit Court concluded, "[t]he nature of this activity—the issuance of debt instruments—is clearly the type of activity that private persons can, and often do, engage in for profit" (App. at 9a).

2. *Direct Effect in the United States.* The Circuit Court concluded that Respondents' alleged nonreceipt in New York City bank accounts of the payments they are seeking to compel was a sufficient nexus with the United States to support jurisdiction under the Act, notwithstanding that Respondents are wholly foreign corporations with no other discernable connection with this country. The court acknowledged that "[l]ocalizing the effect in the United States is . . . problematic when, as here, the plaintiff is a foreign corporation having few, if any, other contacts with the United States forum" (App. at 12a). Nevertheless, the Circuit Court expressly rejected the requirement, embodied in section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) [hereinafter *Restatement (Second) of Foreign Relations Law*], and adopted by four other Circuits, that "for an effect to be considered 'direct' it must be both 'substantial' and 'foreseeable' " (App. at 11a). In its place, the Circuit Court substituted a public policy concern, which it had articulated earlier in an Act of State analysis in *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985), that the courts "preserve . . . New York's status as a world financial leader" (App. at 13a (citing *Allied Bank*)). The potential impact of refusing to extend jurisdiction to this case, the Circuit Court reasoned, might potentially affect New York's position as a respected clearinghouse of United States dollars, thus justifying the conclusion that "Congress

[would] have wanted an American court to entertain an action such as" this one (App. at 14a).

REASONS FOR GRANTING THE PETITION

1. This petition presents important questions concerning the correct interpretation and consistent application of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Specifically, the Court is asked to review the Second Circuit's conclusion that Petitioners' conduct falls within the FSIA commercial activity exception and thus is subject to the jurisdiction of the District Court. As discussed below, the Second Circuit's decision applied what amounts to a *per se* rule that a foreign state obligation to pay money always is commercial activity under the Act—a conclusion not supported by the statute nor adopted by any other Circuit. In addition, in ruling that Petitioners' conduct had a "direct effect" in this country for jurisdictional purposes, the Second Circuit expressly rejected the "direct effect" test embodied in the *Restatement (Second) of Foreign Relations Law* and adopted by four other Circuits. In sum, the tests employed by the Circuit Court to reach its conclusions diverge from the analysis used in other Circuits, and illustrate the pervasive confusion that exists with respect to determining whether and when the commercial activity exception confers jurisdiction over foreign government conduct.

2. The principles of grace and comity upon which the doctrine of sovereign immunity is based create an exceptional need for clarity and consistency in making jurisdictional determinations under the Act.[9] Moreover, to the extent that the decision to subject foreign governments to jurisdiction based on their commercial conduct rests in part on the princi-

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9 *See, e.g., Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *The Schooner Exchange* v. *M'Faddon*, 11 U.S. 116, 135-36 (1812); *see also* House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611 (noting that "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences").

ples of implied consent and estoppel, foreign sovereigns are entitled to have clear notice of the principles that the courts will apply to determine whether their actions will be deemed to be commercial and thus subject to jurisdiction here. The FSIA is the only basis for invoking jurisdiction over a foreign sovereign in the courts of this country. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). It was enacted by Congress in 1976[10] in order to codify and thereby clarify the circumstances under which suit can be brought against foreign nations. House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 [hereinafter *House Report*]. As the Court recounted in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-88 (1983), prior to the Act, the courts struggled for more than twenty years to apply this nation's "restrictive" theory of sovereign immunity based upon the State Department's suggestion, in each instance, as to whether immunity should be granted or withheld.[11] Under this *ad hoc* system of adjudication, "the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488.

3. For that reason, the FSIA was enacted to provide a single rule of decision under which foreign nations are presumptively entitled to immunity unless one of the narrow, statutorily-defined exceptions to immunity is present. 28

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10 Pub. L. No. 94-583, 90 Stat. 2891 (1976).

11 The restrictive theory of immunity was articulated by the Department of State in 1952 in the Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984-85 (1952) [hereinafter *Tate Letter*]. Under this doctrine, foreign states are deemed immune from the jurisdiction of the courts of this country with respect to their "public" acts, and are denied immunity only with respect to their "private" or "commercial" acts. *Tate Letter* at 985; *see Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigacion (C.N.A.N.)*, 730 F.2d 195, 198 (5th Cir. 1984); *Victory Transp. Inc.* v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 357-60 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

U.S.C. § 1604. After 15 years of applying the statute, however, no consistent test has emerged for applying the FSIA "commercial activity" exception. *See Stena Rederi AB* v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 382 (5th Cir. 1991) (noting that judicial interpretation of the FSIA "is no easier now"); *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987) (noting that difficulty in applying commercial activity exception "has resulted in differing approaches on the parts of different courts"); *see also, e.g.*, App. at 7a–8a (discussing Seventh Circuit's misunderstanding of the commercial activity test applied by the Second Circuit). The need for uniform application of this provision is particularly acute because it is the most frequently-invoked jurisdictional predicate. *See House Report*, *supra* p. 10, at 6617 (characterizing the Act's commercial activity exception as "the most important instance in which foreign states are denied immunity"). Despite its importance, however, this provision has never been interpreted by this Court.

4. The lack of clear guidance in this area has caused an array of results in FSIA cases that are difficult to reconcile with each other and, in many cases, with the results in this case. *See, e.g., Gregorian* v. *Izvestia*, 871 F.2d 1515, 1522 (9th Cir.) (publication of allegedly libelous article in Soviet newspaper *Izvestia* held sovereign), *cert. denied*, 493 U.S. 891 (1989); *Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) (contract to reimburse physicians and an organ bank for the costs of kidney transplants ruled commercial), *cert. denied*, 493 U.S. 937 (1989); *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 920 (D.C. Cir.) (purchase and operation of residential property as chancery ruled not commercial), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987); *Joseph* v. *Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987) (Nigeria's lease of residential property for Nigerian Consulate employees ruled commercial), *cert. denied*, 485 U.S. 905 (1988); *City of Englewood* v. *Socialist*

People's Libyan Arab Jamahiriya, 773 F.2d 31, 37 (3d Cir. 1985) (purchase and use of residential property as residence for Libya's Head of Mission to the United Nations ruled not commercial); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1110 (5th Cir. 1985) (sale of foreign exchange held commercial); *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385, 1393-94 (5th Cir. 1985) (bank's issuance of check in regulation of foreign exchange reserves held sovereign); *MOL, Inc.* v. *Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.) (government's contract for export of rhesus monkeys held not commercial), *cert. denied*, 469 U.S. 1037 (1984). Moreover, the lack of a clear standard upon which to base immunity determinations under the Act has caused some courts to revert to the pre-FSIA practice of deferring to the Department of State to resolve the question whether immunity is to be afforded to foreign state conduct in a given case. *See Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987); *see also Gregorian*, 871 F.2d at 1522 (agreeing with *amicus curiae* United States that publishing articles in *Izvestia* constitutes sovereign activity); *Millen Indus., Inc.* v. *Coordination Council*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citing *Practical Concepts* with approval on this point). In *Practical Concepts*, the Court of Appeals for the District of Columbia Circuit invited the United States to present its views as *amicus curiae* in order "[t]o advance the court's just determination whether the activity in question is 'commercial' within the meaning of 28 U.S.C. § 1605(a)(2)" (App. at 31a). The Act clearly was intended to end this practice.[12] The fact that the courts continue to perceive a need for State Department input further supports the importance and timeliness of review by this Court.

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12 *See House Report*, *supra* p. 10, at 6610 (Act discontinues "the practice of judicial deference to 'suggestions of immunity' from the executive branch").

I.

Certiorari Should Be Granted To Clarify The Confusion And Inconsistent Interpretation Of The "Commercial Activity" Exception Under The FSIA And To Review The Test Used By The Second Circuit, Which Too Narrowly Defined The Conduct Subject To Analysis Under The Act And Is Thus In Conflict With Decisions Of Other Circuits

1. This case starkly illustrates the fact that there is no consensus in the federal courts regarding the proper method of determining whether foreign state conduct constitutes commercial activity under the FSIA. 28 U.S.C. § 1605(a)(2).[13] The instruments under which the Respondents seek to compel performance in this case—the Bonods—were issued in Argentina in order to meet Petitioners' governmental obligations under Argentina's FEIC, a plainly public policy response to a perceived credit crisis which affected both Argentina's domestic economy and the central government's own foreign exchange reserves. Additionally, the Bonods raised no capital, were not the mechanism for financing acquisitions by a government entity, and the Argentine government issued them without receiving consideration commensurate with their value in any customary sense. The Bonods thus do not embody "public debt" in any classic or traditional way. The Circuit Court nevertheless imposed what amounts to a *per se* rule that Petitioners' promulgation of the Bonods was an "issuance of debt," and hence by definition commercial activity (App. at 10a).[14] The court reached this conclusion not

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13 The portion of the FSIA that was applied in this case provides that a foreign state shall not enjoy sovereign immunity in a case:

> in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a)(2).

14 The Circuit Court rested its ruling on the Second Circuit's statement in *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991),

because it was compelled by the statute—the legislative history of the Act makes it clear that governmental debts are to be subjected to the same analysis as any other foreign state conduct[15]—but because it misapplied the Act's commercial activity test.

2. The lens through which the court views the foreign state conduct before it inevitably affects its legal characterization of the activity under review. Accordingly, the first step in the FSIA commercial activity analysis is to identify the conduct that is relevant to the court's inquiry. *See, e.g., Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (court's "first task is to identify what particular conduct" is relevant), *cert. denied*, 454 U.S. 1148 (1982); *International Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354, 1357 (9th Cir. 1981) ("immunity question may be determined by how broadly or narrowly [the] activity is defined"), *cert. denied*, 454 U.S. 1163 (1982). In this case the Circuit Court used a lens that is artificially narrow, focusing on Petitioners' single and isolated act of issuing paper which provides for the payment of money. The court thus confined its review to but a single frame of a more complicated—and legally relevant—picture. This resulted in a skewed view of the nature of Petitioners' actions and an erroneous legal conclusion that those actions constituted "commercial activity."

3. Specifically, the Second Circuit stated that it believed it was required to "isolate" the specific acts complained of by Respondents, rather than evaluate them in the context in

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that "[i]t is self-evident that issuing public debt is a commercial activity." The transaction in *Shapiro*, however, in contrast to the issuance and rescheduling of the Bonods, was archetypical commercial conduct: the exchange of promissory notes in payment for goods.

15 In enacting the FSIA Congress elected not to include a blanket immunity for general debts of government, leaving such debts to the same analysis prescribed for other government conduct. *See House Report, supra* p. 10, at 6609; *see also Asociacion de Reclamantes* v. *United Mexican States*, 561 F. Supp. 1190, 1195-96 (D.C.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

which they took place (App. at 8a). To do otherwise, the court concluded, would be to define the conduct "overbroadly," with the result that the government conduct at issue "would almost inevitably be characterized as sovereign in nature" (*id.*). What the Second Circuit failed to recognize, however, is that the converse also is true: if a court insists on surgically removing foreign government acts from their context, and examining them microscopically in the absence of any meaningful background, they will almost inevitably appear to be identical to conduct engaged in by private actors. Such a result is wholly inconsistent with the statutory definition of "commercial activity," which explicitly contemplates that courts will analyze not only a "transaction" or an "act," but the "nature of the course of conduct." *See* 28 U.S.C. § 1603(d).

4. This paradox, and thus the need for a clear test for defining the activity subject to FSIA review, is well illustrated by comparing this case with the decision of the Fifth Circuit in *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). There, as here, the discrete acts at issue were a foreign state's issuance of, and failure to honor, a promise to pay money. The Fifth Circuit, however, concluded that this conduct was sovereign, and not commercial, after evaluating it in conjunction with the attendant circumstances. As the *De Sanchez* court explained, identical actions often may be properly characterized in different ways depending upon the context, and thus the act of issuing a check, for example, may be a simple and routine commercial sale of foreign currency, or "regulation and supervision of a nation's foreign exchange reserves," a quintessential sovereign act. 770 F.2d at 1392-93.[16] A panel of the Seventh Circuit also has recog-

16 The Fifth Circuit noted, *inter alia*, that the Nicaraguan Central Bank "became involved with [the plaintiff] only in its official role in regulating the sale of foreign exchange," and the government's "only authorized purpose in issuing [the obligation] was to maintain stable exchange rates and to allocate scarce foreign exchange reserves." *De Sanchez*, 770 F.2d at 1393. The same is true in this case, but the Second Circuit believed, incorrectly, that it was precluded from considering those facts.

nized that the *De Sanchez* court's consideration of the context and reasons for the government's actions, and its resulting conclusion that those actions were sovereign in nature, was correct. *See Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 578-79 n.5 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989). The reasoning of the Fifth and Seventh Circuits is equally applicable to this case. Accordingly, the Second Circuit's refusal to look beyond the discrete acts cited by the Respondents, to the *origin* of the debt in this case, deprived it of information critical to accurately evaluate the true nature of Petitioners' conduct, and resulted in the erroneous conclusion that Petitioners' conduct was "commercial activity."

5. The District of Columbia Circuit also appears to have implicitly rejected the approach advocated by the Second Circuit, which would confine the courts to the discrete acts in dispute between the parties and prohibit consideration of the context in which those acts took place. *See MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918 (D.C. Cir.), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987). In *MacArthur*, a neighborhood association brought suit against the Republic of Peru for alleged violations of local zoning laws caused by the Republic's purchase, renovation and operation of formerly residential property as a chancery. The court rejected the plaintiffs' contention that those acts constituted commercial activity and thus brought the case within the jurisdiction of the District Court. Rather, the *MacArthur* court determined the nature of the foreign government conduct by evaluating it in context. As a result, the court held that subject matter jurisdiction was not present, because it concluded that "operation of a chancery is, by its *nature* . . . governmental, not commercial" even though maintaining a building, in isolation, plainly is an activity private citizens can and regularly do conduct. *Id.* at 920 (emphasis in original).

6. Congress did not include a precise definition of "commercial activity" in the statute, but rather " 'put [its] faith in the U.S. courts to work out progressively, on a case-by-case

basis . . . the distinction between commercial and governmental.' " *Texas Trading*, 647 F.2d at 309 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) [hereinafter *House Hearings*] (testimony of Monroe Leigh, Legal Advisor, Department of State)).[17] The legislative history indicates that the courts should use as their standard "whether the activity in question is one which private parties ordinarily perform." *House Hearings*, at 53 (testimony of Monroe Leigh). The outcome of any test for distinguishing between sovereign and commercial conduct, however, is determined in the first instance by how narrowly or broadly the Court defines the relevant foreign state conduct. For that reason, review by this Court of the Second Circuit's artificially narrow view of the conduct subject to FSIA analysis is necessary and important.

II.

Certiorari Should Be Granted To Review The Second Circuit's Holding, Which Conflicts With Decisions Of The Third, Fifth, Ninth and District of Columbia Circuits, That There Is A "Direct Effect" In The United States Sufficient To Support FSIA Jurisdiction In The Absence Of A Substantial Effect In This Country On The Parties Before The Court

1. The FSIA provides that even where a foreign state has engaged in commercial activity, the sovereign's acts must have a sufficient nexus with the United States in order to support jurisdiction. *See Stena Rederi AB* v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mex-*

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17 In the only statutory guide as to how the courts should determine whether particular conduct is commercial or governmental, the Act counsels that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

icana, S.C., 923 F.2d 380, 386 (5th Cir. 1991); *America West Airlines, Inc.* v. *GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989). This case squarely presents a split in the Circuits as to the proper test for determining whether a foreign state's commercial activity outside this country has a "direct effect" in the United States under the Act.[18] As the Circuit Court noted in this case, the Second Circuit expressly has rejected the "substantial" and "foreseeable" test embodied in the *Restatement (Second) of Foreign Relations Law*, which is followed by the Third, Fifth, Ninth and D.C. Circuits[19] (App. at 11a (citing *International Hous. Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 n.2 (2d Cir. 1989); *Martin* v. *Republic of South Africa*, 836 F.2d 91, 94 (2d Cir. 1987); *Texas Trading*, 647 F.2d at 311 n.32)). Instead, the Second Circuit based its finding of a direct effect sufficient to support FSIA jurisdiction in this action on localized policy concerns that have not been invoked by any other court. Review by this Court is needed to resolve this conflict among the Circuits.

2. The Respondents are foreign corporations having no stated connection with this country other than the alleged nonreceipt of payment in unidentified bank accounts in New York City. Nevertheless, the Second Circuit found that Petitioners' failure to pay principal and interest to those accounts as scheduled caused a direct effect in the United States sufficient to evoke the jurisdiction of the District Court under the FSIA (App. at 12a). Prior to this decision, the Second Circuit held that the nonpayment of a debt payable in the United

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18 Specifically, section 1605(a)(2) provides for jurisdiction where "an act outside the territory of the United States . . . causes a direct effect in the United States."

19 *See America West Airlines*, 877 F.2d at 799; *Zernicek* v. *Brown & Root, Inc.*, 826 F.2d 415, 417-18 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Maritime Int'l Nominees Estab.* v. *Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983); *Ohntrup* v. *Firearms Ctr., Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985). *See also Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) (stating that the "effects of a foreign state's actions must be 'substantial' and 'direct and foreseeable' "), *cert. denied*, 493 U.S. 937 (1989).

States to a United States company constitutes a direct effect in the United States. *See Texas Trading*, 647 F.2d at 312. This decision marks the first time the Second Circuit has held that a foreign sovereign's nonpayment of a debt payable in the United States to a *foreign* corporation has a direct effect in this country. Such an effect, however, clearly is not substantial in any respect, as required by the other Circuits that previously have interpreted the direct effects clause of the Act.

3. The *Restatement (Second) of Foreign Relations Law* test requires that a foreign state's acts cause effects in this country that are not only "direct and foreseeable" but also are "substantial" in order to support jurisdiction. *See, e.g., America West Airlines*, 877 F.2d at 799; *Zernicek*, 826 F.2d at 417-18; *Maritime Int'l*, 693 F.2d at 1111; *Ohntrup*, 516 F. Supp. at 1286 (all requiring that the effect in the U.S. be not only direct but also substantial).[20] These requirements address Congress' concern that the United States courts not become " 'international courts of claims' . . . [by] requiring some form of substantial contact with the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (citing *House Hearings*, *supra* p. 17, at 31 (testimony of Bruno A. Ristau)).

4. The Second Circuit has expressly rejected the *Restatement (Second) of Foreign Relations Law* test, including the requirement that the effect here on the complaining parties be substantial (App. at 11a). The Second Circuit acknowledged that the effect of the subject foreign state's actions must be "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case" (App. at 12a). It went on, however, to ignore Con-

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20 This test evolved from the legislative history of the FSIA, which indicates that the direct effects clause should be interpreted in a manner "consistent with principles set forth" in Section 18 of the *Restatement (Second) of Foreign Relations Law*. *House Report* at 6618. Section 18 of the *Restatement (Second)* requires that the conduct abroad cause an effect in the United States that is "substantial" and "occurs as a direct and foreseeable result of the conduct outside the territory."

gress' direction in two important respects: that the acts at issue causing the direct effect must be those of the foreign government, and that they must have an important effect in the United States on the parties before the Court.

5. Specifically, the Second Circuit, in contrast to the other courts that have addressed this question, rested its finding of a jurisdictional direct effect not on any effect here on the plaintiffs caused by Petitioners' actions, but rather upon its concern about the practical ramifications of a decision to deny jurisdiction (App. at 14a). Specifically, relying on its earlier Act of State decision in *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985), the Circuit Court substituted its own unique policy considerations with respect to "enhanc[ing] New York's status as a world financial leader," for the FSIA's requirement that the conduct at issue cause a direct effect in the United States to the particular plaintiffs before the Court (App. at 13a (citing *Allied Bank*)). Reliance on this type of policy concern is improper for three reasons.

6. First, the principle of comity which underlies the sovereign immunity doctrine compels that jurisdiction over a foreign government be asserted only as a result of that government's actions here, or the effect that government's action causes here. Second, in order to limit the Act's grant of statutory jurisdiction to disputes that have a sufficient connection with this country, Congress indicated that it intended United States courts to have jurisdiction over a foreign state *only* when there is a direct effect in the United States on the particular plaintiff before the court. *Verlinden*, 461 U.S. at 490. Third, if the kind of generalized interests analysis used by the Circuit Court were sufficient to find jurisdiction, the statutory requirement that the effect be "direct" would have been rendered meaningless.

7. The fact that the Second Circuit relied solely upon its analysis in *Allied Bank* to support its conclusion in this case is evidence of a serious confusion regarding the proper interplay between the Act of State doctrine and the threshold

jurisdictional analysis required under the FSIA. In contrast to the issues raised here, *Allied Bank* involved Act of State concerns and *not* a determination as to whether there was subject matter jurisdiction under the Act. An Act of State analysis, however, weighs the respective interests of the United States and the foreign government only *after* the court concludes that it has jurisdiction over the case pursuant to the FSIA. In this case, the Second Circuit's erroneous method of analysis clearly was the reason for its conclusion that jurisdiction is present here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 1446, 91-7119.

WELTOVER, INC.; SPRINGDALE ENTERPRISES, INC.; BANK CANTRADE, A.G.,

Plaintiffs-Appellees,

v.

REPUBLIC OF ARGENTINA; BANCO CENTRAL DE LA ARGENTINA,

Defendants-Appellants.

Argued May 23, 1991.
Decided Aug. 13, 1991.

Before MESKILL, MINER and MCLAUGHLIN

MCLAUGHLIN, *Circuit Judge*:

This appeal presents two issues of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611. We must first determine whether the act of a foreign sovereign in issuing debt instruments to foreign creditors for the stated purpose of controlling the nation's stock of foreign currency is "commercial activity" within the meaning of the FSIA. If it is, we must then consider whether that action has a sufficient nexus with the United States to justify the exercise of subject matter jurisdiction over the foreign sovereign in an American court.

Plaintiffs, Weltover, Inc. ("Weltover"), Springdale Enterprises, Inc. ("Springdale"), and Bank Cantrade, A.G. ("Bank Cantrade"), sued defendants, the Republic of Argentina ("Argentina" or "the Republic") and Banco Central de la Argentina ("Banco Central"), to recover principal and interest due on certain bonds ("Bonods") issued by defendants. Plaintiffs are holders of a number of these Bonods with a total face value in excess of $1.3 million. Weltover and Springdale are Panamanian corporations; Bank Cantrade is a Swiss bank. Each plaintiff elected, pursuant to a contractual option provided for in the Bonods, to have payment made in New York. Upon defendants' default, plaintiffs commenced the present action. Defendants moved to dismiss for lack of subject matter jurisdiction under the FSIA, lack of personal jurisdiction, and *forum non conveniens*. Judge Sprizzo denied these motions. *Weltover, Inc.* v. *Republic of Argentina*, 753 F.Supp. 1201 (S.D.N.Y. 1991).

Defendants now appeal just the district court's ruling that subject matter jurisdiction is proper under the FSIA. We have appellate jurisdiction pursuant to the "collateral order doctrine" of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). *See, e.g., Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir. 1990) (denial of motion to dismiss for lack of subject matter jurisdiction under the FSIA is subject to interlocutory appeal under the "collateral order doctrine"). We affirm.

BACKGROUND

Argentina's economic woes provide the backdrop for this controversy. Since the 1970's, Argentina has accumulated vast public and private foreign debts. Because Argentine currency—which, prior to 1985, was based on the peso and is presently denominated in australs—is not accepted on the international market as a valid medium of exchange, Argentina depends on its reserves of United States dollars and

other internationally recognized currencies to satisfy foreign debt.

The rapid accumulation of foreign debt in the 1970's began to deplete Argentina's reservoirs of internationally accepted currencies. To cope with this economic miasma, Argentina's Ministry of Economy adopted austere measures in the early 1980's. Banco Central, as the Central Bank of the Republic, was charged with implementing these economic and foreign exchange policies. Pursuant to the crisis-management measures adopted by the Ministry of Economy, Banco Central, in 1981, began adjusting the prevailing foreign exchange rates, which led to a severe devaluation of Argentina's local currency. Devaluation of local currency obviously made it more expensive for Argentine debtors to obtain needed foreign exchange to satisfy their debts.

To counter the devaluation problem, Banco Central implemented the Republic's Foreign Exchange Insurance Contract ("FEIC") program. The purpose of the FEIC was to provide a means by which private debtors could obtain the necessary U.S. dollars at a particular exchange rate, thus avoiding the devastating consequences of the continued devaluation of the local currency. Specifically, the FEIC allowed private Argentine debtors to pay Banco Central a pre-determined amount of local currency upon maturity of the foreign debt; Banco Central would issue the debtor the amount of U.S. dollars required to repay the foreign debt. The amount of local currency that the debtor was required to pay Banco Central was calculated at the exchange rate prevailing at the time the contract was executed, thereby lessening the impact upon the debtor of subsequent devaluations of the local currency.

This creative financing bought Argentina some time since the FEIC contracts did not come due until 1982. However, the continued economic crisis in Argentina found the Republic and Banco Central in 1982 with an insufficient stock of U.S. dollars to enable the private debtors to retire these old debts. Defendants next decided to refinance these obligations by issuing two forms of debt instruments: (1) bonds payable in U.S. dollars (Bonods), and (2) promissory notes.

The Bonods—which are at issue here—provided for payment of principal and interest in U.S. dollars, with interest to be based on the London Interbank rate for Eurodollar deposits. Payment was to be made on either the New York, London, Frankfurt, or Zurich markets, at the election of the creditor. This refinancing program gave the foreign creditor the option of accepting the Bonods in satisfaction of the initial debt, thus releasing the private debtors and substituting defendants as the debtors, or maintaining the debtor/creditor relationship with the original Argentine debtor and accepting the Bonods as guarantees and the defendants as guarantors. For issuing some $1.3 billion in Bonods, Banco Central received a one-tenth of one percent service fee ($1.3 million) from the Secretariat of State for Finance to cover the service costs. Under Argentine foreign exchange regulations adopted by the Ministry of Economy, only Banco Central could pay the creditors in U.S. dollars.

In the tumultuous years following issuance of these Bonods, Argentina's economic slide continued. On May 23, 1986, soon after initial payments of interest were made on the Bonods, the Republic determined that it was still unable to meet its foreign debt obligations. A Presidential Decree required the Ministry of the Economy to direct Banco Central to establish, yet again, alternative means to pay foreign debt instruments such as the Bonods. Pursuant to this Decree, Banco Central unilaterally extended the time for payments on the Bonods, labelling this a "rescheduling." Plaintiffs, holders of the Bonods, refused to accept this "rescheduling" of payment, and brought the present action to compel defendants to honor their obligations.

In denying defendants' motion to dismiss for lack of subject matter jurisdiction under the FSIA, the district court held that defendants' actions in issuing and "rescheduling" the Bonods fit within the "commercial activity" exception of section 1605(a)(2) of the FSIA. *Weltover*, 753 F.Supp. at 1205-07. Judge Sprizzo explored the nature of the act of issuing public debt and determined that it constituted "commercial activity." *Id.* at 1205-06. He went on to hold that there was a sufficient nexus between defendants' acts and the

United States to justify the exercise of subject matter jurisdiction by an American court. *Id.* at 1206-07.

DISCUSSION

Traditional precepts of international law accord sovereign immunity to foreign countries and their agencies or instrumentalities. In its pristine form, the doctrine of sovereign immunity was absolute, but as governments increasingly entered the marketplace to undertake what had previously been private commercial enterprise, the doctrine began to erode. The FSIA now provides a means by which a foreign sovereign and its agencies or instrumentalities may be subjected to the jurisdiction of American courts. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989). The Republic and Banco Central are foreign states within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a) & (b). The parties do not dispute any of these basic principles.

The FSIA codifies the only exceptions to the traditional notion of absolute foreign sovereign immunity. *See* 28 U.S.C. §§ 1605-1607; *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S.Code Cong. & Admin. News 6604, 6605 ("*House Report*") (FSIA codifies the "restrictive" theory of foreign sovereign immunity that was first adopted by the Department of State in the famous Tate Letter of 1952). When one of these exceptions applies, the foreign sovereign is stripped of immunity, and, pursuant to 28 U.S.C. § 1330(a), subject matter jurisdiction exists in the district court. *See Amerada Hess Shipping Corp.*, 488 U.S. at 434, 109 S.Ct. at 688; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983). Whether the Republic and Banco Central may assert immunity thus turns on whether one of the FSIA's exceptions applies.

We are called on to determine whether defendants' act of issuing the Bonods and subsequently failing to pay the bonds on time falls within the so-called "commercial activity"

exception of the FSIA. 28 U.S.C. § 1605(a)(2). Specifically, section 1605(a)(2) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

All parties agree that the third clause [iii] of subsection (2) governs the present case. The issues, then, are whether defendants engaged in "commercial activity," as opposed to sovereign activity, and whether such activity has caused a "direct effect in the United States." Judge Sprizzo answered both questions in the affirmative and we agree.

Commercial Activity

Congress' definition of "commercial activity" is our starting point, although it provides limited guidance: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

Obviously aware that this Olympian generality might be thought unilluminating, Congress explained that it would be both unnecessary and unwise "to attempt an excessively precise definition of ['commercial activity']." *House Report* at 6615. Instead, Congress intended to grant a "great deal of

latitude" to the federal courts in distinguishing between commercial acts and sovereign acts. *Id.*; *see Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). The House Report, however, listed several examples of activities by a foreign sovereign that would fall within the definition of commercial activity. One such illustration is a foreign government's "borrowing of money." *House Report* at 6615.

This Court has attempted to establish somewhat less amorphous standards for determining what is commercial activity. We have construed the FSIA to mean that "if the activity is one in which a private person could engage, [the foreign sovereign] is not entitled to immunity." *Texas Trading*, 647 F.2d at 309. Other circuits have basically taken the same pragmatic approach. *See, e.g., Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.) ("If a private person could have engaged in the same *type* of activity, then the sovereign has presumptively engaged in 'commercial activity' within the meaning of the FSIA . . . ."") (emphasis in original), *cert. denied*, __ U.S. __, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543, 1549-50 (D.C.Cir. 1987).

It should be noted, however, that the Seventh Circuit appears to have read too much into our holding in *Letelier* v. *Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985). In *Rush-Presbyterian*, the Seventh Circuit intimated that, for acts to be considered commercial, the Second Circuit requires a showing that the activities could be conducted by a private person *and* that the foreign sovereign has a profit motive. *See Rush-Presbyterian*, 877 F.2d at 578 n. 4. *Letelier* did not so hold, and we reject this gloss.

In *Letelier* we stated that, for an act to be considered commercial, it must be the type that a private person could engage in. 748 F.2d at 797. We continued by stating that "the court must inquire whether the activity is of the type an individual *would customarily* carry on for profit." *Id.*

(emphasis added). *Letelier* did not go so far as to require a profit motive on the part of the foreign sovereign. Such a requirement would eviscerate the "commercial activity" exception of the FSIA, because foreign sovereigns often act without a profit motive. Our decision in *Letelier* clearly did not intend such a result. Rather, *Letelier* instructs that where a private party would customarily engage in an activity for profit, there can be little question that that private party is engaging in commercial activity. *See House Report* at 6615; *Joseph* v. *Office of Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). When a foreign sovereign engages in the same conduct, that activity retains its commercial nature, even though the foreign sovereign acts without a profit motive.[1]

In considering whether a private person could engage in the activity in question, and would normally conduct such activity for profit, we must isolate the specific conduct that underlies the suit, rather than focusing on "the broad program or policy of which the individual transaction is a part." *Rush-Presbyterian*, 877 F.2d at 580; *see Texas Trading*, 647 F.2d at 308 (court must identify particular conduct that is relevant). Were we to define the relevant conduct overbroadly, the activity would almost inevitably be characterized as sovereign in nature, rather than commercial. Foreign sovereigns constantly implement broad programs intended to stimulate their economy or to avoid economic catastrophe. Each of these programs, however, is implemented through numerous individual transactions. To imbue each transaction with a sovereign character simply because it is part of a broader governmental scheme would run afoul of the FSIA's restrictive theory of foreign sovereign immunity. *See House Report*

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1 The district court found that the 0.1% commission received by Banco Central represents a profit. We express no view on this conclusion, for we note again that a foreign sovereign need not have a profit motive for its acts to be commercial. *See Letelier*, 748 F.2d at 797; *Joseph*, 830 F.2d at 1024 (profit motive not a "*threshold requirement*" for commercial activity) (emphasis in original).

at 6605 (immunity for foreign states restricted to public acts of the sovereign). Overbroad definition of the issue takes the Court perilously close to the shadowy line between the *nature* and the *purpose* of the activity in question. The FSIA clearly dictates that, in distinguishing commercial acts from sovereign acts, courts should refer to the nature of the activity, and not its purpose. 28 U.S.C. § 1603(d).

We recognize, of course, that "nature" and "purpose" are closely-knit concepts and that "the purpose of an act may be *relevant* in defining its nature . . . ." *Joseph*, 830 F.2d at 1023 (emphasis in original); *see also De Sanchez* v. *Banco Central De Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985) ("[o]ften, the essence of an act is defined by its purpose"). Nevertheless, the activity's purpose must remain ancillary to its nature, and we must " 'confine any consideration of purpose as closely as we can, considering that purpose *only so far as is absolutely necessary* to define the nature of the act in question.' " *Rush-Presbyterian*, 877 F.2d at 577-78 (quoting *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) (emphasis added)). When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome.

We turn now to Argentina's activity in this case. Putting to one side defendants' attempts to cast this controversy in Keynesian terms as a response to Argentina's economic straits, we note that this case revolves around defendants' issuance of the Bonods as public debt, and the subsequent failure to retire that public debt upon maturity. The nature of this activity—the issuance of debt instruments—is clearly the type of activity that private persons can, and often do, engage in for profit. Recently, we stated that "[i]t is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2)." *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) (negotiable promissory notes issued by the Republic of Bolivia); *see Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) (per curiam) (issuance of public debt by Russian Imperial Government in 1916 would have been commercial activity had the FSIA been in effect at the time), *cert.*

denied, 487 U.S. 1219, 108 S.Ct. 2874, 101 L.Ed.2d 909 (1988); *see also House Report* at 6615 (foreign sovereign's borrowing of money is an example of commercial activity). Because defendants' issuance of public debt—the Bonods—immersed them in the stream of international commerce in foreign currency, the nature of that act was commercial; there was nothing uniquely sovereign about this activity.

We decline defendants' implied invitation to characterize the conduct in issue as a governmental effort to conserve scarce resources, i.e., U.S. dollars. Such an overbroad characterization goes to the *purpose* of the entire program, rather than to the *nature* of the transaction in issue. *See Rush-Presbyterian*, 877 F.2d at 580 (cautioning against overbroad definition of the relevant conduct); *Texas Trading*, 647 F.2d at 308. The nature of this particular transaction is clearly commercial, and, thus, we need look no further.

Because the issuance of the debt was a commercial activity, the subsequent breach of contract cannot be cloaked in immunity. Once a sovereign enters the marketplace as a commercial actor, it " 'should be subject to all the rules of the marketplace.' " *Texas Trading*, 647 F.2d at 310 (quoting *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 369, 1 All E.R. 881). In *Texas Trading*, we implicitly discounted any claim that the breach itself could be imbued with a sovereign nature. *See id.* at 310. The focus must be on the nature of the underlying activity, rather than on the nature of the last act, i.e., the breach. We do not disagree that "[w]here a government enters into a contract in its sovereign capacity, then the breach of that contract partakes of the contract's initial sovereignty." *De Sanchez*, 770 F.2d at 1394. We believe, however, that the converse must hold true as well: where a sovereign enters the marketplace as a commercial actor, a subsequent breach of the commercial contract retains that commercial nature.

We therefore hold that the relevant acts were commercial in nature, rather than sovereign, and we proceed to consider whether the requisite nexus with the United States is present.

Direct Effect in the United States

In addition to finding that the foreign sovereign was engaged in commercial activity, the FSIA also requires a finding that the acts in question "cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). In *Texas Trading*, we expressly left open the question whether a foreign sovereign's nonpayment to a foreign plaintiff of a debt payable in the United States suffices to meet this statutorily-mandated nexus. *Texas Trading*, 647 F.2d at 312. This question now squarely confronts us. We hold that defendants' acts caused a direct effect in the United States.

Parsing the statute and attempting to localize the injury is "an enterprise fraught with artifice." *Id.* We have cautioned that, rather than getting steeped in the metaphysics of such amorphous terms as "direct" and "in the United States," courts must be concerned with Congress' goal of opening the courthouse doors "to those aggrieved by the commercial acts of a foreign sovereign." *Id.*; *see Verlinden*, 461 U.S. at 490, 103 S.Ct. at 1969 (Congress intended the FSIA to provide access to American courts to both American and foreign plaintiffs). Thus, when deciding whether the effect was both "direct" and "in the United States," we must remain mindful of the congressional purpose.

This Court has never been persuaded that for an effect to be considered "direct" it must be both "substantial" and "foreseeable." *See Int'l Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 n. 2 (2d Cir. 1989) (listing contrary cases from other circuits); *Martin* v. *Republic of South Africa*, 836 F.2d 91, 94 (2d Cir. 1987); *Texas Trading*, 647 F.2d at 311 n. 32. The reference in the legislative history of the FSIA to section 18 of the Restatement (Second) Foreign Relations Law, which embodies the substantiality and foreseeability prerequisites, "is a bit of a *non sequitur*" because the Restatement section deals with the extent to which American substantive law may be applied to extraterritorial conduct, rather than the reach of a federal court's subject matter jurisdiction. *Texas Trading*, 647 F.2d at 311 & n. 32. The question before us is not whether American substantive law may govern the Bonods,

but whether an American court has jurisdiction to hear the case. To frame the issue more precisely, "[t]he question is, was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?" *Id.* at 313. Thus, for subject matter jurisdiction purposes—i.e., the authority of the court to entertain an action—we concern ourselves with the extent of the contact with the United States to determine whether that nexus sufficiently implicates the interests of the forum jurisdiction in controlling conduct within its borders.

We need not tarry long over whether the effect, in this case, was direct. There can be no question that, pursuant to the FSIA, a "direct" effect may occur as the result of a contractual violation. *See Carey* v. *National Oil Corp.*, 592 F.2d 673, 676-77 (2d Cir. 1979) (per curiam). Where the plaintiff is a corporation, "the relevant inquiry under the direct effect clause . . . is whether the corporation has suffered a 'direct' financial loss." *Texas Trading*, 647 F.2d at 312. For the financial loss to be "direct", the corporate entity must itself be placed in financial peril as an immediate consequence of the defendant's unlawful activity. *See Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978) (effect is "direct" where there is no intervening element), *aff'd*, 607 F.2d 494 (D.C.Cir. 1979). When, as here, the breach of an agreement deprives the corporate plaintiff of capital to which it is lawfully entitled there is a direct financial loss to the plaintiff. Because defendants' breach of the Bonod agreement deprived plaintiffs of their contractual rights to receive payment in U.S. dollars, defendants' acts caused a direct effect to plaintiffs.

A more troublesome inquiry is whether the effect was sufficiently "in the United States" to warrant our exercise of subject matter jurisdiction. Localizing the effect in the United States is more problematic when, as here, the plaintiff is a foreign corporation having few, if any, other contacts with the United States forum. Clearly, a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business. We believe, however, that a

bright-line rule limiting the situs of an effect to the foreign plaintiff's domicile, place of incorporation, or principal place of business is too facile an interpretation of the FSIA. Were it so limited, it would be the rare instance in which any foreign plaintiff could be said to suffer a direct effect in the United States.

In determining where the effect is felt directly, courts often look to the place where legally significant acts giving rise to the claim occurred. *See Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir. 1988) (legally significant event must occur in the United States). We have stated that "[a]n injury to a corporation occurs in some legally significant situs, for instance, . . . a place designated for performance of a contract . . .." *Rafidain Bank*, 893 F.2d at 11 n. 3 (citing *L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F.Supp. 114, 121-122 (S.D.N.Y. 1988)). While we determined in *Rafidain Bank* that subject matter jurisdiction did not lie under the FSIA, our rationale was based, in large measure, on the fact that "[p]ayment in New York City was not a contractual requirement . . .." *Id.* at 12.

In *L'Europeenne de Banque*, which we cited with approval in *Rafidain Bank*, the district court held that nonpayment of a debt which the foreign sovereign was contractually obligated to pay to the foreign plaintiff in the United States caused a direct effect in the United States. *See L'Europeenne de Banque*, 700 F.Supp. at 121-22. This was so because the United States had an interest in protecting the foreign plaintiff from the breach. *Id.* at 122 (citing Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L.Rev. 474, 512 (1980)). Support for this position has been building in the district courts for several years. *See Rafidain Bank*, 893 F.2d at 13 (Kaufman, J., dissenting) (noting the recent trend to find a direct effect in the United States because of nonpayment of a debt due to a foreign plaintiff in the United States).

We have stated, albeit in a slightly different context, that public policy should make American courts available to foreign plaintiffs if this will preserve or even enhance New York's status as a world financial leader. *See Allied Bank*

Int'l v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.) ("act of state" doctrine), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985). "The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world. Further, New York is the international clearing center for United States dollars." *Id.* at 521. Such policy considerations, while enunciated in relation to the "act of state" doctrine, have an equally direct bearing on the interest of New York in encouraging foreign debtors to pay their debts that are due in New York even though the plaintiffs are not domiciled in New York. These policy considerations bear directly on the ultimate FSIA question: Would Congress have wanted an American court to entertain an action such as the present one? We think the answer must be yes.

Here, the contract gave plaintiffs the option to call for payment in New York. Plaintiffs exercised that option. The legally significant act was defendants' failure to abide by the contractual terms; i.e., to make payments in New York. The effects occurred, in the first instance, in New York, when the plaintiffs' accounts were not credited with the outstanding amount of U.S. dollars. As such, the act of nonpayment caused a direct effect in the United States.

Public policy considerations compel the conclusion that Congress would have wanted an American court to entertain this action. New York, as a preeminent commercial center, has an interest in protecting those who rely upon that reputation to do business, whether through the banking industry or otherwise. *See Allied Bank*, 757 F.2d at 521-22; *L'Europeenne de Banque*, 700 F.Supp. at 122. If individuals or corporate entities become wary of their ability to protect their rights in business transactions conducted in New York they will look elsewhere. We think it clear that Congress, in enacting the "direct effects" clause of the commercial activity exception, intended American courts to entertain actions that promote the interests of forum jurisdictions in controlling conduct that occurs within their borders. Here, an assertion of subject matter jurisdiction fulfills that congressional intent.

CONCLUSION

We hold that defendants' issuance of the Bonods and subsequent breach of the agreements was "commercial activity" within the meaning of the FSIA. Furthermore, defendants' commercial acts caused a direct effect in the United States, thus providing the statutorily-mandated nexus. As such, defendants are stripped of sovereign immunity, and the district court has subject matter jurisdiction.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Plaintiffs,

v.

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Defendants.

No. 89 Civ. 6926 (JES)
Jan. 3, 1991

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiffs Weltover, Inc. ("Weltover"), Springdale Enterprises, Inc. ("Springdale"), and Bank Cantrade, A.G. ("Bank Cantrade"), bring this action against the Republic of Argentina ("Argentina") and Banco Central De La Republica Argentina ("Banco Central") alleging that the defendants have breached obligations arising out of the issuance of certain bonds. The defendants move to dismiss the action for lack of subject matter jurisdiction and lack of personal jurisdiction or, in the alternative, pursuant to the doctrine of *forum non conveniens*. For the reasons that follow, the motions are denied.

BACKGROUND

Plaintiffs Weltover, Springdale and Bank Cantrade are all holders in due course of various indentures denoted as "Reg-

istered Bonds Denominated in United States Dollars," which are referred to in the parties' papers as "Bonods". *See* Complaint ¶¶ 10-15, 22-23, 29-30.[1] These indentures were issued by Banco Central, which is the financial agent for the Republic of Argentina, pursuant to Argentina's Foreign Exchange Insurance Contract ("FEIC") program. *See* Complaint at ¶¶ 5, 11; Affidavit of Daniel Marx at ¶¶ 3, 9 (sworn to April 11, 1990) ("Marx Aff.").[2]

That program, instituted in 1982, sought to deal with the devaluation of Argentinian currency on the world market by allowing an Argentinian borrower required to pay a debt in dollars to pay a specified amount of the local currency to Banco Central and receive in exchange the amount of U.S. dollars necessary to repay the loan. *See* Marx Aff. at ¶¶ 7-8. However, when the exchange insurance contracts matured in late 1982, Banco Central was unable to deliver the dollars necessary to retire the Argentine debtors' original loans. *See* Marx Aff. at ¶ 9. Accordingly, Banco Central issued two new types of instruments to refinance those debts: Bonods and promissory notes. *See id.*

The Bonods provided in relevant part that payment would be made in United States dollars on scheduled dates in 1986

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1 Weltover, a Panamanian corporation, holds title by assignment to Bonods totalling $900,000. *See* Complaint ¶ 14. Springdale, also a Panamanian corporation, holds title by assignment to Bonods totalling $200,000. *See id.* at ¶ 22. Bank Cantrade, a Swiss Bank, holds title to Bonods totalling $230,000. *See id.* at ¶ 29.

2 The Court has considered the Marx Affidavit and the exhibits annexed thereto in determining whether subject matter jurisdiction is appropriate under the Foreign Sovereign Immunities Act. This is consistent with the Second Circuit's holdings that a court may properly rely upon affidavits and other evidence in resolving a motion challenging subject matter jurisdiction. *See, e.g., Kamen* v. *American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986); *Exchange Nat'l Bank of Chicago* v. *Touche Ross & Co.*, 544 F.2d 1126, 1130-1131 (2d Cir. 1976); *see also L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F.Supp. 114, 119 n. 6 (S.D.N.Y. 1988) (citing *Braka* v. *Bancomer, S.A.*, 589 F.Supp. 1465, 1468 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985)). Plaintiffs have not contested any of the facts relied upon herein and, indeed, have cited the Marx Affidavit and pertinent exhibits in support of their arguments.

and 1987 and would bear interest at the annual prevailing London Interbank market rate for 180-day Eurodollar deposits. Furthermore, they would be paid into a holder's account at either New York, London, Frankfurt or Zurich. *See* Complaint ¶ 16; Marx Aff. ¶¶ 10-11 & Exs. B-C.

Significantly, foreign creditors were given the option of maintaining their relationship with the original Argentine debtors, with the Bonods given in guarantee, or to accept the Bonods or promissory notes as payment of the original debt.[3] *See* Marx Aff. at ¶ 10. However, under Argentina's foreign exchange laws only Banco Central could have paid the creditors in American dollars. Moreover, Banco Central collected a commission of one-tenth percent (0.1%) in connection with the aforesaid transactions. *See* Marx Aff., Ex. B, Decree No. 1334, at Art. 6; *see also* Affidavit of Richard W. Cutler, Esq. ¶ 3 (sworn to May 29, 1990) ("Cutler Aff.").

However, financial difficulties in Argentina continued, with the consequence that on or about May 23, 1986 defendants, acting pursuant to a governmental decree and an order from the Ministry of the Economy, notified plaintiffs that

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3 Banco Central's Communication "A" 251, dated November 17, 1982, which sets forth in detail the method by which Bonods and promissory notes would be available to refinance the debts, provides in part:

> 1.2. The instrumentation of the transactions shall be optional for the foreign creditor and may be done in any of the following forms:
>
> (a) Obligations ("Promissory Notes") of the National Government issued in U.S. dollars to the name of the creditor, for the corresponding amounts.
>
> (b) Registered Bonds of the National Government, issued in U.S. dollars in increments of U.S. $5,000 and larger denominations.
>
> (c) Since it is not the purpose of these measures to interfere in the loan contract between the debtor and creditor, if they prefer to maintain their relationship directly and instrument it in any form other than the two forms indicated above, the Central Bank is willing to examine such proposals and conditions, provided that they respect the terms of maturity indicated in Section 1.1.

Banco Central Communication "A" 251 at 2 (annexed to Marx Aff. at Ex. H.); *see also* Banco Central Communication "A" 272 (additional details regarding relevant procedures when the leaders and borrowers decide to maintain a direct relationship).

payment would not be made on the Bonods when due and requested that they participate in a "rollover" of those obligations. *See* Complaint at ¶¶ 17, 24, 31; Marx Aff. at ¶¶ 12-14. Plaintiffs refused to participate in that rollover and now assert that Banco Central is in default on its obligations under the Bonods. *See* Complaint at ¶¶ 18-20, 25-27, 32-34.

DISCUSSION

Defendants urge three grounds for dismissal of the complaint: (1) that the Court lacks jurisdiction over the defendants under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988) ("FSIA"); (2) that the exercise of personal jurisdiction over the defendants violates due process; and (3) that the Court should dismiss the complaint under the doctrine of *forum non conveniens*.

The Foreign Sovereign Immunities Act

The FSIA provides that foreign sovereigns and their instrumentalities are immune from suit in United States courts unless the conduct complained of fits within various specified exceptions. *See Letelier* v. *Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985); *see also Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (holding that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court). Plaintiffs argue that Argentina and Banco Central are subject to jurisdiction under the FSIA because the complaint is based upon their commercial activities, *see* 28 U.S.C. § 1605(a)(2), and because they have waived sovereign immunity.[4] *See* 28 U.S.C. § 1605(a)(1).

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4 In light of the Court's conclusion that the defendants are subject to the "commercial activity" provision of the FSIA, the Court need not consider plaintiffs' argument that the defendants have waived sovereign immunity, either explicitly or implicitly.

The commercial activity exception to sovereign immunity provides that a foreign state does not enjoy immunity in a case where

> the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In order to determine whether an action fits within this exception, the Court must consider (a) whether the action was "commercial" and (b) whether the action had a sufficient statutory nexus with the United States. *See Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982).

Commercial activity is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d); *see Texas Trading*, *supra*, 647 F.2d at 308-10. The FSIA further provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d); *see also* H.Rep. No. 1487, 94th Cong., 2d Sess. at 16, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6615 ("House Report"). In applying this test, courts have focused upon whether the activity in question is one in which private parties could ordinarily engage or whether it is limited to sovereigns. *See, e.g.*, *Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 578 & n. 4 (7th Cir.) *cert. denied*, ____ U.S. ____, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Letelier*, *supra*, 748 F.2d at 797; *Texas Trading*, *supra*, 647 F.2d at 309-10; *Braka* v. *Bancomer, S.A.*, 589 F.Supp. 1465,

1469 (S.D.N.Y. 1984), *aff'd on other grounds*, 762 F.2d 222 (2d Cir. 1985).

The transactions at issue here fall squarely within the parameters of what private commercial entities do and have the capacity to do. In permitting creditors to substitute Banco Central's obligation to pay them in dollars for that of the original debtors in exchange for a 0.1% commission, Banco Central was performing a quintessentially commercial act. This is especially true since the existence of a profit motive, although not dispositive, is a factor the Court may properly consider in deciding what is a commercial as opposed to a sovereign act.[5] Furthermore, the creditors were not forced to accept Banco Central as a substitute obligor, but were free to maintain their prior relationship with the debtor.[6]

Indeed, the only serious argument that can be made in support of the claim that sovereign activity is at issue here is the assertion that the Bonods were issued as a consequence of Argentina's financial crisis and for the purpose of implementing Argentina's currency control regulations. However, that claim is refuted by the plain language of the FSIA itself,

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5 The Court does not read the Second Circuit's decision in *Letelier*, *supra*, as imposing a requirement that a foreign sovereign have a profit motive in order for its activities to be considered commercial. Rather, that case stated only that a court may properly consider evidence of a profit motive in ascertaining whether the sovereign's activities are commercial. *See* 748 F.2d at 797; *see also Joseph* v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988); House Report, *supra*, at 16, 1984 U.S.Code Cong. & Admin.News at 6615 ("Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed.").

6 Insofar as the Currency Regulations which resulted in the issuance of the Bonods precluded payment by the original debtor in dollars and altered the schedule of payments set forth in the original contracts, the Government of Argentina may not have been engaged in commercial activity. However, this action is not for altering the terms of the original contract and thereby inducing this breach. Instead, plaintiffs are suing Banco Central for breaching the obligation it assumed for a fee in place of the obligation of the original debtors. This action therefore is not based upon any sovereign activity of the Government, even assuming that the acts referred to above were arguably sovereign in nature.

which as noted above, requires that the Court look to the nature of the act, and not its purpose.[7]

In sum, Banco Central's obligation to pay in dollars was in its nature a contractual understanding and did not become clothed with sovereign immunity merely because in assuming that contractual obligation the Bank was implementing a foreign currency control policy on behalf of the Ministry of Economy, which was primarily responsible for fashioning and directing the monetary policies of the government of Argentina. *See* Organic Charter of the Central Bank of the Argentine Republic at Art. 3(b) (purpose of the Bank shall be "[t]o execute the exchange policy outlined by the Ministry of Economy with counsel from the Central Bank") (annexed to Marx Aff. as Ex. F); *id.* at Art. 4 ("The Bank's activity shall conform to the general directives in matters of financial, currency-exchange, monetary and economic policy that the National Government may issue through the Ministry of Economy"); *see also id.* at Art. 35 (requiring the Bank to advise and report to Ministry of Economy about monetary exchange); *id.* at Art. 38 (same).[8]

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7 Defendants' reliance upon *DeSanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), is misplaced. That case held that because in post-revolutionary Nicaragua the Central Bank had overall responsibility for the control and management of Nicaragua's monetary reserves the bank's decision to stop payment on a check issued by the bank when it was controlled by the former regime to the wife of the former Minister of Defense was a sovereign act. *See* 770 F.2d at 1393-94. That case turned upon the fact that the defendant bank was responsible for control of Nicaragua's foreign exchange. *See id.* Further, the court noted that the bank had earned no fee from the check. *See id.* at 1393. Neither situation is present here because the Ministry of the Economy in Argentina, not Banco Central, was ultimately responsible for fiscal policy and Banco Central did earn a commission. *See also Rush-Presbyterian, supra*, 877 F.2d at 578-79 n. 5 (limiting *DeSanchez* to the "extraordinary circumstances" before the court in that case); *Chisholm & Co.* v. *Bank of Jamaica*, 643 F.Supp. 1393, 1400 n. 5 (S.D.Fla. 1986) (same).

8 This is further evidenced by the circumstance that Banco Central refused to pay on the Bonods because it was directed not to by the Ministry of the Economy, not because of a policy decision by the Bank itself. *See* Decree No. 772 of May 23, 1986 (annexed to Marx Aff. as Ex. I); Resolution of Ministry of Economy of May 23, 1986 (annexed to Marx Aff. as Ex. J).

This case is therefore very similar to *Braka* and *Callejo*, *supra*, where sovereign immunity was denied in situations where banks breached an obligation to pay on certificates of deposit because they were mandated to do so by currency control regulations which they did not promulgate. The same result should and must obtain here. Although the issuance of currency control regulations may be sovereign activity, the implementation of that policy through the issuance of commercial paper is not. *See West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 825 (9th Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2483, 96 L.Ed.2d 375 (1987); *Callejo*, *supra*, 764 F.2d at 1109-10; *Braka*, *supra*, 589 F.Supp. at 1470. It follows that the issuance of the Bonods in this case was a commercial and not a sovereign act.

Having concluded that the Bank's activity in this instance was a commercial agreement to pay a sum of money, the Court must next consider whether that commercial activity had the requisite nexus with the United States. *See* 28 U.S.C. § 1605(a)(2). Since this action clearly does not involve either "commercial activity carried on in the United States" by the defendants or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," 28 U.S.C. § 1605(a)(2), the only issue to be resolved is whether defendants' commercial activity had a direct effect in the United States. *Id.*

The Second Circuit has held that nonpayment of a debt payable in the United States to a United States company constitutes a direct effect in the United States for purposes of the FSIA. *See Texas Trading*, 647 F.2d at 312; *accord Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 487, 98 L.Ed.2d 485 (1987). However, that Court has left open the question of whether the same conclusion should be reached with respect to the nonpayment of a debt payable in the United States to a foreign plaintiff. *See Texas Trading*, *supra*, 647 F.2d at 312; *International Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 n. 3 (2d Cir. 1989). While it is true that with respect to a foreign plaintiff the injury may be felt elsewhere as well, *i.e.*, at the domicile of the plaintiff, that circum-

stance does not alter the fact that the act of nonpayment which causes that injury occurs in both instances in the United States. It follows that in either case there is a direct effect within the United States sufficient to meet the requirements of the FSIA. *Accord L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F.Supp. 114, 121-22 (S.D.N.Y. 1988); *see also Int'l Housing*, *supra*, 893 F.2d at 13 (Kaufman, J., dissenting) (noting trend among district courts to conclude that nonpayment of a debt to a foreign plaintiff in the United States constitutes a "direct effect").

Public policy considerations also lend support to this conclusion. The United States has a substantial interest in maintaining New York's status as an international financial center. *See L'Europeenne de Banque*, *supra*, 700 F.Supp. at 122 (citing *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985)). This status will be enhanced by the result reached here because businesses will, as did plaintiffs here, choose to have payments made to them through New York's financial centers if they are confident that they can utilize American courts to protect their legal rights. This choice to accept payment in New York therefore "sufficiently implicates" the United States' interest in protecting people within its territories. *See L'Europeenne de Banque*, *supra*, 700 F.Supp. at 122.

Personal Jurisdiction

Defendants also urge the Court to dismiss the complaint for lack of personal jurisdiction. However, the FSIA merges the concepts of personal and subject matter jurisdiction so that the Court has personal jurisdiction in any case in which the FSIA authorizes subject matter jurisdiction, so long as proper service is made, (which is not in dispute here), and so long as the requirements of due process are satisfied. *See* 28 U.S.C. § 1330(b); *Texas Trading*, *supra*, 647 F.2d at 308, 313; *Walpex Trading Co.* v. *Yacimientos Petroliferos Fiscales Bolivanos*, 712 F.Supp. 383, 390 (S.D.N.Y. 1989). The exer-

cise of personal jurisdiction is consistent with due process in any case where a defendant has sufficient contacts with the United States such that the exercise of jurisdiction would not offend " 'traditional notions of fair play and substantial justice.' "[9] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)).

This test requires that the Court assess the defendants' contacts with the United States to determine: (1) the extent to which defendants availed themselves of American law; (2) the extent to which litigation in the United States was foreseeable to them; (3) the inconvenience to defendants of litigating in the United States; and (4) the countervailing interest of the United States in hearing the suit. *Texas Trading*, *supra*, 647 F.2d at 314; *see generally*, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567-68, 62 L.Ed.2d 490 (1980); *Kulko* v. *California Superior Court*, 436 U.S. 84, 94, 98 S.Ct. 1690, 1698, 56 L.Ed.2d 132 (1978).

Thus, a defendant may be subject to personal jurisdiction, consistent with due process, both when the plaintiff's cause of action arises out of or is related to the defendant's contacts with the forum state and when it does not.[10] *See Heli-*

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9 The personal jurisdiction analysis under the FSIA looks to the defendant's contacts with the entire United States, not just the relevant state or forum. *See Texas Trading*, *supra*, 647 F.2d at 314; *Walpex Trading*, *supra*, 712 F.Supp. at 390 n. 6; *Meadows* v. *Dominican Republic*, 628 F.Supp. 599, 606-07 (N.D.Cal. 1986), *aff'd*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 98 L.Ed.2d 485 (1987).

10 Defendants' argument that the FSIA permits personal jurisdiction only in those cases in which a plaintiff's action is related to a defendant's contacts with the United States is unsupported by both the language of the FSIA and its legislative history. Indeed, acceptance of that argument would render the "direct effect" provision of 28 U.S.C. § 1605(a)(2) superflous because that section necessarily contemplates the exercise of jurisdiction in

copteros Nacionales, *supra*, 466 U.S. at 414, 104 S.Ct. at 1872. However, in the latter case, more substantial contacts with the forum are necessary to support the exercise of personal jurisdiction. *See Walpex Trading*, *supra*, 712 F.Supp. at 390.

No serious claim can be made here that plaintiffs have failed to allege contacts of the defendants with the United States that would justify the exercise of personal jurisdiction over them. These include the following: (1) Banco Central's promise to pay plaintiffs in New York; (2) the Argentine government's maintenance of consulates throughout the country; (3) Banco Central's commercial activities in the United States; and (4) both defendants' maintenance of bank accounts in the United States. *See* Complaint at ¶¶ 8-9; Affidavit of Richard Cutler at ¶ 5 & Exs. E & F (sworn to May 29, 1990).[11]

This is especially true since the maintenance of bank accounts in the United States, protected by American laws governing the banking and insurance industries, has been held to indicate that a defendant has availed itself of American laws. *See Texas Trading*, *supra*, 647 F.2d at 314; *Hatzlachh Supply Inc.* v. *Savannah Bank of Nigeria*, 649 F.Supp. 688, 691 (S.D.N.Y. 1986). Furthermore, the circumstance that defendants agreed to pay the Bonods in United States

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situations where all of the contacts relevant to the cause of action occur outside the United States. *See Walpex Trading*, *supra*, 712 F.Supp. at 390-91; *Meadows*, *supra*, 628 F.Supp. at 605-06. Moreover, courts in FSIA cases have considered contacts that are both related and unrelated to the plaintiff's cause of action. This is, of course, consistent with the FSIA, which permits the exercise of jurisdiction to the maximum extent permitted by due process. *See, e.g.*, *Texas Trading*, *supra*, 647 F.2d at 314-15; *Walpex Trading*, *supra*, 712 F.Supp. at 391; *Crimson Semiconductor, Inc.* v. *Electronum*, 629 F.Supp. 903, 907-08 (S.D.N.Y. 1986). *But see Exchange Nat'l Bank* v. *Empresa Minera del Centro del Peru, S.A.*, 595 F.Supp. 502, 505 (S.D.N.Y. 1984).

11 Because there has been no jurisdictional discovery in this action, plaintiffs need only allege in good faith legally sufficient allegations of jurisdiction. *See Ball* v. *Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

dollars in an American Bank surely made an action for breach of that obligation in the United States foreseeable. *See Schmidt* v. *Polish People's Republic*, 579 F.Supp. 23, 28 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (2d Cir. 1984); *see also Hatzlachh*, *supra*, 649 F.Supp. at 691 ("where a defendant negotiates or obtains the services of a plaintiff through the use of United States mail and phone system and *agrees to pay in the United States*, litigation in the United States has been held to be foreseeable.") (emphasis added). Moreover, defendants' maintenance of a consulate and commercial offices in New York indicates that the defendants transact business here with some regularity.

Forum Non Conveniens

Finally, defendants assert that the Court should dismiss the action pursuant to the doctrine of *forum non conveniens*. That doctrine, which allows a district court to dismiss an action because other public and private interest outweigh the ordinary deference given to a plaintiff's choice of forum, is fully applicable to an action governed by the FSIA. *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 n. 15, 103 S.Ct. 1962, 1970 n. 15, 76 L.Ed.2d 81 (1983); *Crimson Semiconductor*, *supra*, 629 F.Supp. at 908. The private interests central to a *forum non conveniens* determination are the ease of access to proof and the availability of witnesses, *i.e.*, the ability to compel the presence of unwilling witnesses or the costs of transporting willing witnesses to the United States for trial. *See Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). The public interests include the administrative burden on the Court, the burden that jury duty imposes upon the community when the action has no relationship to the community and the concerns raised by the possible need to apply foreign law. *See id.* at 508-09, 67 S.Ct. at 843; *Borden, Inc.* v. *Meiji Milk Prods. Co.*, 919 F.2d 822, 827-28 (2d Cir. 1990).

An essential determination for a *forum non conveniens* inquiry is whether there is an adequate alternative forum to

resolve the dispute. *See Borden*, *supra*, 919 F.2d at 828-29; *Hatzlachh*, *supra*, 649 F.Supp. at 692; *Crimson Semiconductor*, *supra*, 629 F.Supp. at 908. Defendants in this case have not even asserted which particular forum they would relegate plaintiffs to, although it would obviously be the courts of Argentina. However, defendants have put forth no affidavits which would permit the court to conclude that Argentina is an appropriate forum. For example, there is no information in the present record which would allow the court to assess whether plaintiffs can even sue the Republic of Argentina in an Argentine court; whether plaintiffs would be able to enforce a judgment and receive American dollars in satisfaction of such a judgment; whether the action would be barred by the statute of limitations; or whether plaintiffs would have the ability to compel the testimony of witnesses. Accordingly, the court concludes that defendants have failed to show that Argentina provides an adequate alternative forum for this action. *See Hatzlachh*, *supra*, 649 F.Supp. at 692; *Crimson Semiconductor*, *supra*, 629 F.Supp. at 908-09.

Moreover, even if Argentina was a suitable alternative forum, the private interest factors listed in *Gulf Oil*, *supra*, do not support the conclusion that Argentina is a more appropriate forum for resolution of this dispute than this Court. Defendants have not provided the Court with a list of witnesses they would call at trial and their residence, which has been held to be a prerequisite for *forum non conveniens* dismissal. *See Hatzlachh*, *supra*, 649 F.Supp. at 692; *Ocean Shelf Trading Inc.* v. *Flota Mercante Grancolombiana S.A.*, 638 F.Supp. 249, 251 n. 4 (S.D.N.Y. 1986). In the absence of such information, the Court cannot assess how defendants will be prejudiced by litigation in New York. In any event, this action centers upon defendants' obligations under the Bonods and therefore the factual issues will be largely supported by documentary proof. That circumstance also renders defendants' claim of prejudice doubtful.

Finally, the Court notes that the public interest factors also militate against dismissal under *forum non conveniens*. The need to apply Argentine law, if the Court must do so, is not itself a justification for dismissal under *forum non conve-*

niens. See Manu Int'l, S.A. v. *Avon Prods., Inc.*, 641 F.2d 62, 67 (2d Cir. 1981). Moreover, since this is a non-jury trial case, *see* 28 U.S.C. § 1330(a); *see also* 28 U.S.C. § 1441(d), a local jury will not be burdened in resolving the dispute.

CONCLUSION

For the reasons set forth above, defendants Republic of Argentina and Banco Central de la Republica Argentina's motions to dismiss shall be and hereby are denied in all respects.

It is SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6001
CA 82-03706

PRACTICAL CONCEPTS, INC.,
Appellant,

v.

REPUBLIC OF BOLIVIA, et al.
[Filed Oct. 14, 1986]

Before:
Wald, Chief Judge, Ginsburg and Bork,
Circuit Judges

ORDER

This case concerns the interpretation and application of 28 U.S.C. § 1605(a)(2), the "commercial activity" exception to the immunity of a foreign state to suit in the United States. The claim-in-suit stems from a contract between plaintiff-appellant Practical Concepts, Inc. (PCI) and the Republic of Bolivia (Bolivia). Largely funded by the United States Agency for International Development, the contract provides for consulting services by PCI to Bolivia in devising and implementing a comprehensive development plan for Bolivia's rural areas. The district court held that the action was not "based on a commercial activity," 28 U.S.C. § 1605(a)(2); on that account, the court dismissed the complaint "without prejudice to resolution of the dispute in a proper forum." *Practical Concepts, Inc. v. Republic of Bolivia*, 613 F.Supp. 863, 872, *recon. denied*, 615 F.Supp. 92 (D.D.C. 1985).

The appeal was briefed by counsel for PCI and Bolivia and was argued to this court on October 6, 1986. To advance the court's just determination whether the activity in question is "commercial" within the meaning of 28 U.S.C. § 1605(a)(2), the court believes a brief amicus curiae by the United States, or the appropriate agency thereof, is desirable. Accordingly, the court invites the United States, or the appropriate agency thereof, to present its views as amicus curiae, on the application of 28 U.S.C. § 1605(a)(2) to this case, on or before November 17, 1986. The parties shall have seven days thereafter to file supplemental briefs responding to positions taken in the brief amicus curiae.

Per Curiam
FOR THE COURT:

George A. Fisher
Clerk

OPPOSITION

BRIEF

QUESTIONS PRESENTED

1. Does the issuance of internationally-negotiable bonds by the Republic of Argentina and its central bank constitute a "commercial transaction" under the Foreign Sovereign Immunities Act?

2. Are Argentina and its central bank precluded from raising an issue in their petition for certiorari which they did not raise in the courts below?

3. Does the failure of the Republic of Argentina and its central bank to make contractually-required interest and principal payments in New York City in U.S. dollars constitute a direct effect in the United States under the Foreign Sovereign Immunities Act?

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No. 91-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

vs.

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondents own $1,330,000 of bonds issued by the petitioners in 1982. The petitioners have defaulted on these bonds (the "Bonods"), and respondents seek payment, approximately $2,000,000 including accrued interest.

The respondents are three foreign corporations: Weltover, Inc. and Springdale Enterprises, Inc. are organized under the laws of Panama, and Bank Cantrade, A.G. is organized under

the laws of Switzerland. There are no corporations to be listed pursuant to Sup. Ct. R. 29.1. The petitioners are the Republic of Argentina and its central bank.

The Bonods require scheduled payments of interest and principal in United States dollars to be made in New York City or other international financial centers at the request of the bondholders. The Bonods are internationally negotiable except to Argentine citizens or residents.

Before May 1986 petitioners had made scheduled interest payments to the respondents in the United States. In May 1986 the petitioners stopped paying and offered bondholders substitute instruments, which respondents refused. In 1989 respondents demanded payment (in New York City) of all principal and accrued interest, petitioners refused, and respondents brought this action for breach of contract in the United States District Court for the Southern District of New York under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (the "FSIA").

Respondents differ with petitioners' presentation of the facts in a few respects: petitioners should have noted that the Bonods are internationally negotiable; petitioners erroneously imply that their unilateral decision to stop payments was the product of international negotiations [*cf.* Petition, p.6, lines 7-11, and the Second Circuit's opinion, Appendix, 4a, lines 24-29]; the petitioners characterize the purported significance of what the Bonods do not include when the Bonod terms are not part of petitioners' appendix; and we maintain that petitioners' recitation of Argentina's sad economic history is utterly irrelevant to these proceedings.

Insofar as this court deems Argentina's economic history to be an appropriate consideration, the Second Circuit's summary of facts in the "Background" section of its opinion (Appendix, 2a-5a) is both comprehensive and non-partisan, and we respectfully refer the court thereto.

The district court and the Second Circuit found that subject matter jurisdiction exists under § 1605(a)(2) of the FSIA,

specifically that (i) petitioners' issuance of the Bonods was a commercial activity under § 1603(d) of the FSIA and (ii) petitioners' breach of their promise to pay their obligations in New York City was a legally significant act which created a direct effect in the United States.

We do take issue with some of petitioners' characterizations of the methods and content of the reasoning in the courts below, particularly because petitioners include this as part of their statement of the case rather than in argument. We discuss these characterizations in the body of our argument, although the opinions of the courts ultimately speak for themselves.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

The FSIA grants immunity from actions in the United States to foreign states and their instrumentalities subject to certain exceptions. By far the broadest exception is for a state's "commercial activity". 28 U.S.C. § 1605(a)(2)

More particularly, a foreign state is subject to suit under the FSIA regarding "an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.*, third clause This provision lies at the heart of this action.

A "commercial activity" includes "a particular commercial transaction or act" the character of which "shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose." 28 U.S.C. § 1603(d)

The last sentence of Section § 1603(d) is the touchstone of the FSIA. Without the nature/purpose distinction, virtually every transaction of a foreign state would be immune, an element of some public purpose. It is irrelevant "that goods or services to be procured through a contract are to be used for a public purpose. . . . Such contracts are to be considered commercial contracts, even if their ultimate object is to further a public function." Report of the House of Representatives, #94-1487 (94th

Cong., 2d Sess. 1976, hereafter the "House Report"), p.16 The House Report also defines borrowing money as a commercial activity under the FSIA. *Id.*

The FSIA contains no indication of any limitation based on the citizenship of the plaintiff; a foreign plaintiff may prosecute such an action so long as it satisfies the substantive standards of the FSIA. *Verlinden, B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490-1 (1983)

SUMMARY OF REASONS FOR DENYING THE PETITION

Commercial Activity. The circuits have consistently determined that a transaction is commercial under the FSIA if a private party can engage in the type of conduct sued upon. Petitioners issued bonds and promised to repay borrowed money, an activity in which private parties regularly engage, an activity described by the district court as "quintessentially commercial" (Appendix, 21a), and by the Second Circuit as "clearly commercial" (Appendix, 10a). Petitioners' argument that their purpose in issuing the Bonods be determinative contradicts the explicit language of the FSIA.

Direct Effect in the United States. The court should not consider an issue which petitioners now raise for the first time: the perceived difference between the Second Circuit and other circuits in determining what constitutes a direct effect in the United States. Substantively, the circuits have by themselves developed a collegial understanding that a direct effect occurs if a foreign sovereign could expect its acts to have a significant impact in the United States. The decisions which find that a direct effect has occurred would not be altered by applying any other circuit's expressed standard. Petitioners' breach of its agreement to pay respondents in New York had a direct, substantial, and foreseeable effect in the United States; thus, petitioners' issue is moot because all the factors for a finding of direct effect are present under any test.

I.

The circuits agree (a) as to the test for a "commercial activity" under the FSIA and (b) that the purposes of the foreign sovereign are irrelevant to that determination; under that test the issuance of the Bonods is a commercial activity.

(a) The basic test of a commercial activity under §§ 1603(d) and 1605(a)(2) is recognized throughout the circuits.

If a private person can perform the type of activity sued upon, it is "commercial activity" under the FSIA. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Velidor* v. *L/P/G/ Benghazi*, 653 F.2d 812, 817, n.7 (3d Cir. 1981) [citing *Texas Trading, supra*], *cert. dismissed*, 455 U.S. 929 (1982); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988); *Rush-Presbytrian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 580 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied.*, 484 U.S. 976 (1987); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) [citing *Texas Trading, supra*].

Further, the courts are completely consistent in limiting their examination to "the *specific* conduct at issue. . . rather than the broad program or policy of which the individual transaction is a part." *Rush, supra*, 877 F.2d at 580, emphasis by the court; *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) [Section 1605(a)(2) focuses on "particular conduct" giving rise to the claim in question.]

Specifically, a sovereign's financial instruments have been regularly held to be commercial activity under the FSIA. The rule is pristine in its simplicity: Promulgation of economic policy is sovereign; implementation of economic policy through issuance of debt instruments is commercial. *West* v. *Multibanco*

Comerex, S.A., 807 F.2d 820, 825 (9th Cir. 1987) [Issuing certificates of deposit is commercial activity.]; *Callejo, supra*, 764 F.2d at 1109-10 [Issuing certificates of deposit is commercial activity.]; *Texas Trading, supra*, 647 F.2d at 310 [Letters of credit are commercial activity.]

To find this commerciality "self-evident" one need recognize only that a bond is a very traditional contract for a very valuable service, the use of money. *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) [Negotiable promissory notes are commercial.] Just as it is commercial activity for a foreign consulate to rent space, *Joseph* v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), it is commercial activity for petitioners to rent money.

Both the district court and the Second Circuit found that petitioners' issuing public debt instruments – the Bonods – is an activity which private parties regularly do and, hence, commercial activity under the FSIA. (Appendix, 21a, 9a-10a)[1]

Nevertheless, petitioners claim that FSIA decisions are "difficult to reconcile" (Petition, p.11), but a careful reading of petitioners' authorities shows that no such conflict exists.

For example, *City of Englewood* v. *Socialist People's Libyan Arab Jamariya*, 773 F.2d 31 (3d Cir. 1985) and *MacArthur Area Citizens Ass'n.* v. *Republic of Peru*, 809 F.2d 918, *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987), are not about the purchase of property – as petitioners claim – but, rather, the use of property as a foreign mission.

City of Englewood cites the Fourth Circuit's holding that the purchase of property for ultimate diplomatic use is a commercial transaction under the FSIA, 773 F.2d at 36. "Consequently [the purchasor] would be subject to suit under

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[1] Petitioners' implication that there is some internal inconsistency in the district court's opinion (Petition, p.7, lines 3-8) can be explained only as an excess of zeal. It is best resolved by reading the entire footnote which the Petition quotes in part. (Appendix, 21a, n.6)

§ 1605(a)(2) by the vendor if a dispute arose over the sale." *United States* v. *County of Arlington*, 669 F.2d 925, 934 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982) *MacArthur* contrasts the non-commercial activity of operating a chancery with the commerciality of "a contract to make repairs on an embassy building." 809 F.2d at 920, citing House Report, p.16 The circuits' accord is the rule, not the Petition's representation of disarray.[2]

Notwithstanding petitioners' doubts, the circuits have a clear standard for determining commercial activity.

(b) The purpose for which petitioners issued the Bonods is not relevant in determining whether or not petitioners engaged in commercial activity.

In the end, petitioners' sole argument is the purpose for which they issued the Bonods, an argument that conflicts with the very language of § 1603(d). The district court recognized this (Appendix, 21a), as did the Second Circuit (Appendix, 10a). On the other side of their purpose coin, petitioners argue that the Bonods are somehow not garden variety public debt.

The circuits regularly exclude consideration of a sovereign's purpose in determining what constitutes a commercial activity. *e.g.*, *Meadows*, *supra*, 817 F.2d at 523, citing House Report, p.16, "The term 'commercial activity' applies to an agreement that might be made by a private person, nothwithstanding the fact that the goods or services to be procured through the contract are to be used for a public purpose." *See also*, *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) [Contract with individual to promote Spanish wines is commercial,

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[2] Petitioners in fact emphasize the circuits' consistency in citing *MOL, Inc.* v. *People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (Petition, p.12). [A license to export a nation's natural resources is not commercial activity because a private party could not make such an agreement.] Also unremarkable is petitioners'authority that the commercial activity exception to sovereign immunity cannot be used to circumvent immunity specifically preserved against libel actions in 28 U.S.C. § 1605(a)(5)(B). *Gregorian* v. *Isvestia*, 871 F.2d 1515, 1520-1 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989)

albeit the purpose is to increase Spanish exports and thus reduce unemployment in Spain.]; *Rush*, *supra*, 877 F.2d at 580 [Hospital's contract with Greece to perform kidney transplants on Greek citizens is commercial; to view it as "one small part" of Greek health care system goes to purpose rather than nature.]

On this issue petitioners rely solely upon *DeSanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985) as their basis for certiorari. There the wife of Anastazio Somoza's defense minister attempted to prematurely redeem a certificate of deposit in U.S. dollars held in a Nicaraguan bank, just as the regime toppled. When the revolutionary government refused to pay on the check issued to Sra. DeSanchez through a New Orleans bank, the Fifth Circuit held that this was not commercial activity, in part based on a consideration of the purpose of Nicaragua's post-Somoza foreign exchange regulations. *DeSanchez*, *supra*, 770 F.2d at 1393

No reported decision in any court relies on *DeSanchez* in finding activity not commercial under the FSIA. Courts reviewing the result have severely restricted its scope, ["[T]o give the 'commercial exception' its proper scope, *DeSanchez* must be limited to the extraordinary circumstances before the court in that case." *Rush*, *supra*, 877 F.2d at 579, n.5] or refused to follow it altogether ["The court is confident that the Fifth Circuit would have ruled otherwise under less stressful political conditions." *Chisholm* v. *Bank of Jamaica*, 643 F.Supp. 1393, 1400, n.5 (S.D.Fla. 1986)].[3]

The teleological inquiry of the Fifth Circuit's dicta in *DeSanchez* is undeniably profound in its examination of how a court resolves a perceived statutory ambiguity. However, "When the nature of an act is transparent by reference merely to the type

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[3] There is good argument that *Chisholm* reflects the law of the Fifth Circuit, not *DeSanchez*. In a recent case, a Fifth Circuit district court relied on *Chisholm*, *Texas Trading*, *supra*, and *Meadows*, *supra*, in determining commercial activity. *DeSanchez* is not mentioned. *Hester International Corp.* v. *Federal Republic of Nigeria*, 681 F.Supp. 371, 383 (N.D.Miss. 1988), *affirmed on other grounds*, 879 F.2d 170 (5th Cir. 1989)

of activity, the purpose should not bear on the outcome." (Appendix, 9a)

Finally petitioners, who substituted themselves as debtors through the Bonods, argue that the Bonods are not "traditional" public debt because the petitioners did not receive any "customary compensation". (Petition, p.13) In other words, petitioners' purpose was not profit-driven, an issue of no consequence in the determination of commercial activity. *Joseph, supra*, 830 F.2d at 1024 Again, issuance of the Bonods is no less commercial because the petitioners were forced to act in response to a "perceived credit crisis". (Petition, p.13) A country might not like to spend its foreign exchange to buy a million pairs of boots for its army, or a billion tons of wheat to feed its populace, but such contracts would surely be commercial activities, even if there were a threat of invasion or famine. *Texas Trading, supra*, 647 F.2d at 310 To use petitioners' word, a contract to pay back borrowed money is truly "archetypical" commercial conduct. (Petition, p.14, n.14)

Petitioners seek no less than a third review of a position which has been found without merit by two courts, a position whose reasoning has been rejected by courts across the country, a position which conflicts with the very language of the FSIA.

II

This court can disregard any difference between the circuits as to their standards for determining "direct effect in the United States" because (a) the petitioners raise it here for the first time and (b) under any test petitioners' breach of their promise to pay in New York constitutes such a direct effect.

(a) Petitioners' cannot now for the first time raise an issue they never argued below.

Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States (1965, superseded) (hereafter "Section 18") provides that the standard for prescribing controlling law

should be based on whether the sovereign's acts were direct, foreseeable and substantial. The House Report, p. 19, suggests that determinations of direct effect be made "consistent with principles" of Section 18, although Congress did not incorporate that language into the FSIA. As this section discusses prescription rather than jurisdiction, the Second Circuit has found the suggestion to be "a bit of a non sequitur", *Texas Trading, supra*, 647 F.2d at 311, and it has not overtly used those standards while other circuits have. Petitioners seek to make this perceived difference an issue before this court.

Prior to the the Second Circuit's decision petitioners made no suggestion that any difference in the Second Circuit's test was a question of this litigation. They merely stated the test in a footnote to the Second Circuit and moved on. (In all fairness to petitioners, they do not allege that they did raise the issue earlier.)

A question not raised in the court of appeals is not properly before this court. *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981) This court has occasionally relaxed the rule for exceptional cases, *Heckler* v. *Campbell*, 461 U.S. 458, 469, n.12 (1983), citing *McGoldrick* v. *Compagnie Generale Transtlantique*, 309 U.S. 430, 434 (1940), but petitioners have not offered any suggestion or evidence to indicate that this case is "exceptional".

Petitioners did not consider this issue "special and important" enough to raise below, Sup.Ct.R. 10.1, and they should not be permitted to pursue a mere afterthought in this court.

(b) Petitioners' breach created a direct effect in the United States under any test.

The opinions of the circuits harmonize on this interpretation of the third clause of § 1605(a)(2): There is a direct effect in the United States if the foreign sovereign could reasonably expect its actions to to cause some significant impact here. *Meadows, supra*, 628 F.Supp. 599, 604-05 (N.D.Cal. 1986), 817 F.2d at 523 [Even where the contract does not specifically provide for payment in the United States, there is a direct effect

if the sovereign defendants, "could reasonably have expected that payment would be called for at a bank in the United States."]; *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir. 1988) [Direct effect is created when sovereign causes a legally significant act to occur in the United States, as in *Texas Trading, supra*, and *Transamerican S.S. Corp.* v. *Somali Democratic Republic*, 767 F.2d 998 (D.C.Cir. 1985).]; *America West Airlines, Inc.* v. *GPA Group Ltd.*, 877 F.2d 793, 799 (9th Cir. 1989) [Finding direct effect in *Meadows* is consistent with narrow reading of *Texas Trading* since defendant could expect significant effect in the United States, citing *Zedan, supra*.]; *International Housing, Inc.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 12 (2d Cir. 1989) [Plaintiff's payment to a sovereign in New York, which was not a contractual guaranty, did not create direct effect.]; *Stena Rederi AB* v. *Comision de Contratos de Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 390-91 (5th Cir. 1991) [Plaintiff's voluntary guaranty through New York bank is not a defendant's act creating direct effect in the United States.]

The circuits may express their direct effect standards differently, but that is not the point. The authorities which find a direct effect in the United States would not be changed by applying another expressed standard. The opinions in *America West Airlines, Zedan, both supra*, and *Weltover* itself show that the circuits have worked their own way toward a common-sense blending of tests. The law has developed not by decree from above but through the circuits' collegial respect for one another. More significantly, petitioners do not attempt to demonstrate that any other circuit using any other test would have decided this case differently.

The essence of the Second Circuit's opinion on the substance of petitioners' acts is petitioners' breach of their contract – the Bonods – to pay respondents in New York City in U.S. dollars. Payment in New York constituted 100% of performance: the respondents or their predecessors-in-interest had long ago completed their lending function. Petitioners' failure to credit respondents accounts in New York is the "legally significant act"

which caused a direct effect in the United States. (Appendix, 14a, lines 16-23, citing, *n.b.*, *Zedan*, *supra*, 849 F.2d at 1515); *America West Airlines*, *supra*, 877 F.2d at 799; *Antares Aircraft, L.P.* v. *Federal Republic of Nigeria*, 1991 WL 219088 (2d Cir.) [*Weltover* requires a legally significant event to occur in the United States. By itself, financial loss by an American partnership is not direct effect.][4]

Petitioners' failure to pay as promised in New York was the "direct causal connection" to respondents' financial loss. *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1027, n.22 (D.C.Cir. 1982) An effect is "direct" when there is no intervening factor. *Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *affirmed mem.*, 607 F.2d 494 (D.C.Cir. 1979) The sovereign's foresight is specifically an element of the test for personal jurisdiction enunciated in *Texas Trading:* No FSIA case can proceed without such a finding. 647 F.2d at 314 Petitioners agreement to pay the respondents in U.S. dollars into an American bank "surely made an action for breach of that obligation in the United States foreseeable." (Appendix, 27a)

In short, petitioners' acts were found to be substantial, direct, and foreseeable. Petitioners' breach of its promise to pay in New York was a legally significant act.

Petitioners forged the chain of events which brings them to suit in New York. No matter the terms one uses to define the test – and we are convinced that there is no subtantive difference among the circuits – the petitioners' breach created a direct effect in the United States under § 1605(a)(2). For this court's purposes, petitioners' argument on this subject is moot.

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[4] In a most unfortunate choice of expression, petitioners assert that the Second Circuit "substituted" public policy as the basis for its decision. (Petition, Statement of the Case, p.8, lines 27-29) In fact, the Second Circuit first decided that petitioners created a direct effect in the United States and only then considered public policy in considering an additional issue, whether Congress would have wanted an American court to hear this case. (Appendix 14a) This court can easily confirm which exposition of the opinion is accurate.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents

(3)

No. 91-763

FEB 14 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 8, 1991
CERTIORARI GRANTED JANUARY 10, 1992

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DATE	NR.	PROCEEDINGS
10/18/89	1	Fld Complaint; Issued Summons & Notice purs to 28 USC 636(c). KG
2/28/90	4	Fld order, sve by the pltff upon deft shall be deemed consummated. . . SPRIZZO,J. LA
4/12/90	5	Fld defts notice of motion to dismiss the complt, rtn dte 7-6-90 at 10AM. LA
4/12/90	6	Fld affdvt of Daniel Marx in support of motion to dismiss. LA
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6/1/90	11	Fld pltffs affdvt of Richard Cutler in opposition to defts motion to dismiss. LA
6/1/90	12	Fld pltffs memo of law in opposition to defts motion to dismiss. LA
1/4/91	16	Fld opinion & Order #67275, defts Republic of Argentina and Banco Central de la Republica Argentina's motions to dismiss shall be and hereby are denied in all respects. . . . SPRIZZO, J. KS
1/30/91	18	Fld DEFTS NOTICE OF APPEAL to the U.S. Court of Appeals for the 2nd Circuit from an of Hon. J.E. SPRIZZO, entered in the Clerk's office for the USDC, SDNY on 1/4/91 denying defts' motion to dismiss the Complaint purs. to the Foreign Sovereign Immunities Act of 1976 Fld on 2/1/91. MAILED COPIES TO:

RICHARD W. CUTLER
342 Madison Ave.
NY, NY 10173

WEIL GOTSHAL & MANGES
c/o RICHARD DAVIS
767 Fifth Ave.
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2/28/91	19	Fld notice of original record has been transmitted to the USCA. LA

NO FURTHER ENTRIES,
SEE COMPUTERIZED DOCKET

Relevant Document Entries in the Court of Appeals

Proceedings include all events.
91-7119 Weltover, Inc., et al v. Republic of Argentina, et al

DATE	PROCEEDINGS
2/5/91	Copy of district court docket entries and notice of appeal on behalf of Appellants Republic of Argentina, Banco Central de la Republica Argentina filed. [91-7119] (cop)
2/5/91	Copy of receipt re: payment of docketing fee filed on behalf of Appellants Republic of Argentina et al receipt #: 28332. [91-7119] (cop)
2/5/91	Appellants Republic of Argentina et al Form C filed, with proof of service. [91-7119] [received 2/4/91] Form C deadline satisfied. (cop)
2/5/91	Appellants Republic of Argentina et al Form D filed, with proof of service. [91-7119] [received 2/4/91] Form D deadline satisfied. (cop)
2/6/91	Scheduling order #1 filed. Record on appeal due on 3/1/91. Appellant's brief and appendix due on 3/8/91. Appellee's brief due on 4/8/91. Argument as early as week of 4/29/91. (Pre-Argument Conference scheduled for 2/15/91 @ 3:00PM).
2/13/91	Notice of appearance form on behalf of Richard W. Cutler, Esq., received. (Orig. to Calendar) (twg)
2/28/91	Record on appeal filed. (Original papers of district court.) Number of volumes: 1 (kb)
3/8/91	Notice of appearance form on behalf of Richard J. Davis, Esq., received. (Orig. to Calendar) (mat)

DATE	PROCEEDINGS
3/8/91	Appellant Republic of Argentina, Appellant Banco Central de la brief FILED with proof of service. (twr)
3/8/91	Appellant Republic of Argentina, Appellant Banco Central de la joint appendix filed w/ pfs. (twr)
4/5/91	Appellee Weltover, Inc., Appellee Springdale Enterpris, Appellee Bank Cantrade, A.G. brief FILED with proof of service Satisfy appellee's brief due. (twk)
4/8/91	Proposed for argument the week of 5/20/91. (cal)
4/18/91	Set for argument on 5/23/91 at USCthse. [91-7119] (cac)
4/19/91	Appellees Weltover, Inc., Springdale Enterpris, Bank Cantrade, A.G., & Appellant Republic of Argentina, Appellant Banco Central de la 28(J) letter (stipulation that page 45 of Joint Appendix is replaced by attached clear copy) received. (twk)
4/22/91	Appellant Republic of Argentina, Appellant Banco Central de la reply brief filed with proof of service. (ar)
5/6/91	Appellee Weltover, Inc., Springdale Enterpris 28(J) letter received. (twg)
5/23/91	Case heard before MESKILL, MINER, MCLAUGHLIN, C.JJ. (TAPE: 235 + 236) (car)
8/13/91	Judgment AFFIRMED by published signed opinion filed. (JMCL). (twm)
8/13/91	Judgment filed. (twm)

DATE	PROCEEDINGS
8/23/91	Appellees Weltover, Inc., Springdale Enterpris, and Bank Cantrade, A.G. itemized and verified bill of costs received. (twm)
8/29/91	Appellant Republic of Argentina, Appellant Banco Central de la Republica Argentina's motion to stay the mandate pending application to Supreme Court for a writ of certiorari. Filed (w/pfs). [212900-1] (twt)
8/30/91	Appellee Weltover, Inc., Appellee Springdale Enterpris, Apellee Bank Cantrade, A.G. statement of costs taxed in the amount of $225 filed. (twh)
9/3/91	Order FILED GRANTING motion to stay issuance of mandate until November 8, 1991 [212900-1] by Appellant Republic of Argentina, Banco Central de la, endorsed on motion form dated 8/29/91. (twt)
9/9/91	Appellees Weltover, Inc. Springdale Enterpris, Bank Cantrade, A.G. motion to amend order staying mandate only to 10-3-91 filed (w/pfs). [215125-1] (twm)
9/9/91	Appellant Republic of Argentina, Appellant Banco Central de la affidavit in opposition to motion to amend document [215125-1] filed (w/pfs). (twm)
9/12/91	Order FILED DENYING motion to amend [215125-1] by Appellee Weltover, Inc., Springdale Enterpris, Bank Cantrade, A.G., endorsed on motion dated 9/9/91. (twm)
11/15/91	Notice of filing petition for writ of certiorari for Appellant Republic of Argentina, & Banco Central de la dated 11.8.91 filed. Supreme C#: 91-763. (twm)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. ( )

WELTOVER INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Plaintiffs,

—against—

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Defendants.

COMPLAINT

Plaintiffs, by their attorney Richard W. Cutler, complaining of the defendants allege as follows:

IDENTIFICATION OF PARTIES, JURISDICTION, VENUE

1. Plaintiff Weltover Inc. is a corporation duly organized and existing under the laws of Panama.

2. Plaintiff Springdale Enterprises, Inc. is a corporation duly organized and existing under the laws of Panama.

3. Plaintiff Bank Cantrade, A.G. is a bank corporation duly organized and existing under the laws of Switzerland.

4. Defendant Republic of Argentina is a foreign state as defined in 28 U.S.C. § 1603(a).

5. Defendant Banco Central de la Republica Argentina ("Banco Central") is a foreign corporation organized and

existing under the laws of the Republic of Argentina, is the Central Bank of Argentina, and is an agency or instrumentality of the Republic of Argentina as defined in 28 U.S.C. § 1603(b).

6. This court has original jurisdiction of this action pursuant to 28 U.S.C. § 1330 as

(a) this action is based upon the commercial activity of the defendants which is an exception to sovereign immunity pursuant to 28 U.S.C. § 1605(a)(2); and

(b) defendants have waived immunity explicitly or implicitly pursuant to 28 U.S.C. § 1605(a)(1).

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), (d), and (f).

FIRST CAUSE OF ACTION:
ON BEHALF OF WELTOVER INC.

8. For all periods relevant hereto, defendant Republic of Argentina has maintained consulates in various cities in the United States, including New York City, such consulates maintaining bank accounts protected by the laws of the States in which the accounts are kept and by the laws of United States.

9. Upon information and belief, defendant Banco Central for all periods relevant hereto, has carried on commercial activities in the United States and particularly in the Southern District of New York, regarding the transactions described below.

10. On or about November 26, 1982, defendant Banco Central acting for defendant Republic of Argentina executed, issued, and delivered (i) Promissory notes denominated in United States dollars and (ii) certain indentures denoted "Registered Bonds Denominated in United States Dollars ("Bonods") to various banks and corporations, including institutions located in the United States and institutions

located outside the United States the controlling affiliates of which are located in the United States.

11. The Promissory notes and Bonods were all issued pursuant to a series of decrees and acts of the defendants regarding the absorption of outstanding foreign commercial debt in Argentina.

12. Upon information and belief, defendants sought, negotiated with, and designated agents in New York City for the administration and payment of the promissory notes and the Bonods.

13. The designated agents paid to plaintiffs' accounts in New York City some of the interest payments due and owing pursuant to the provisions of the Bonods.

14. In 1985, Weltover Inc. acquired for value title by assignment to the following Bonods in their respective amounts, which Weltover Inc. still owns:

0202688	$ 50,000
0202689	50,000
0202690	50,000
0202691	50,000
0304491	100,000
0304492	100,000
0304493	100,000
0304494	100,000
0304495	100,000
0304496	100,000
0304509	100,000

15. Such purchases were made in good faith, Weltover Inc. had no knowledge of any adverse claims, and Weltover Inc. continues to hold such Bonods. Pursuant to the terms of the Bonods, Weltover Inc. gave notice of its respective purchases to Banco Central.

16. The Bonods provide in relevant part that principal payments be made on scheduled dates in 1986 and 1987 and bear interest at the annual prevailing London interbank market

rate for 180-day Eurodollar deposits, such payments be made to the holder's account in New York, London, Frankfurt or Zurich.

17. On or about May 23, 1986, defendants notified Weltover Inc. and, upon information and belief, all holders of the Bonods that payment would not be made on the Bonods when due, and defendants requested Weltover Inc. and, upon information and belief, the other holders of Bonods to participate in a "roll-over" of these obligations.

18. Weltover Inc. did not accept or agree to the "roll-over" or any other extension or variation in the terms of the Bonods.

19. Defendants have not paid, and Weltover Inc. has not received (i) any payments of principal and (ii) some payments of interest as required by the terms of the Bonods. Weltover Inc. has demanded such payment of principal and interest of the Bonods from and by the defendants, but defendants have not made any such payment of principal or interest of the Bonods held by Weltover Inc. to Weltover Inc.

20. Defendants are indebted to Weltover Inc. in the sum of $900,000.00 face amount of the Bonods plus interest, calculated pursuant to the provisions of the Bonods.

SECOND CAUSE OF ACTION:
ON BEHALF OF SPRINGDALE ENTERPRISES, INC.

21. Springdale Enterprises, Inc. repeats and realleges Sections 4 through 13, and Section 16 of the Complaint as if set forth in full herein.

22. In 1985, Springdale Enterprises, Inc. acquired for value title by assignment to the following Bonods in their respective amounts, which Springdale Enterprises, Inc. still owns:

0201510	$ 50,000
0201513	50,000
0305660	100,000

23. Such purchases were made in good faith, Springdale Enterprises, Inc. had no knowledge of any adverse claims, and Springdale Enterprises, Inc. continues to hold such Bonods. Pursuant to the terms of the Bonods, Springdale Enterprises, Inc. gave notice of its respective purchases to Banco Central.

24. On or about May 23, 1986, defendants notified Springdale Enterprises, Inc. and, upon information and belief, all holders of the Bonods that payment would not be made on the Bonods when due, and defendants requested Springdale Enterprises, Inc. and, upon information and belief, the other holders of Bonods to participate in a "roll-over" of these obligations.

25. Springdale Enterprises, Inc. did not accept or agree to the "roll-over" or any other extension or variation in the terms of the Bonods.

26. Defendants have not paid, and Springdale Enterprises, Inc. has not received (i) any payments of principal and (ii) some payments of interest as required by the terms of the Bonods. Springdale Enterprises, Inc. has demanded such payment of principal and interest of the Bonods from and by the defendants, but defendants have not made any such payment of principal or interest of the Bonods held by Springdale Enterprises, Inc. to Springdale Enterprises, Inc.

27. Defendants are indebted to Springdale Enterprises, Inc. in the sum of $200,000.00 face amount of the Bonods plus interest calculated pursuant to the provisions of the Bonods.

THIRD CAUSE OF ACTION:
ON BEHALF OF BANK CANTRADE, A.G.

28. Bank Cantrade, A.G. repeats and realleges Sections 4 through 13 and Section 16 of the Complaint as if set forth in full herein.

29. In 1983, Bank Cantrade, A.G. acquired for value title by assignment to the following Bonods in their respective amounts, which Springdale Enterprises, Inc. still owns:

0050533	$ 10,000
0050534	10,000
0050535	10,000
0301875	100,000
0301876	100,000

30. Such purchases were made in good faith, Bank Cantrade, A.G. had no knowledge of any adverse claims, and Bank Cantrade, A.G. continues to hold such Bonods. Pursuant to the terms of the Bonods, Bank Cantrade, A.G. gave notice of its respective purchases to Banco Central.

31. On or about May 23, 1986, defendants notified Bank Cantrade, A.G. and, upon information and belief, all holders of the Bonods that payment would not be made on the Bonods when due, and defendants requested Bank Cantrade, A.G. and, upon information and belief, the other holders of Bonods to participate in a "roll-over" of these obligations.

32. Bank Cantrade, A.G. did not accept or agree to the "roll-over" or any other extension or variation in the terms of the Bonods.

33. Defendants have not paid, and Bank Cantrade, A.G. has not received (i) any payments of principal and (ii) some payments of interest as required by the terms of the Bonods. Bank Cantrade, A.G. has demanded such payment of principal and interest of the Bonods from and by the defendants, but defendants have not made any such payment of principal or interest of the Bonods held by Bank Cantrade, A.G. to Bank Cantrade, A.G.

34. Defendants are indebted to Bank Cantrade, A.G. in the sum of $250,000.00 face amount of the Bonods plus interest calculated pursuant to the provisions of the Bonods.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

(a) As to the First Cause of Action, in favor of Weltover Inc. in the face amount of $900,000.00, plus

interest pursuant to the provisions of the Bonods, and all costs and disbursements of this action;

(b) As to the Second Cause of Action, in favor of Springdale Enterprises, Inc. in the face amount of $200,000.00 plus interest computed pursuant to the provisions of the Bonods, and all costs and disbursements of this action;

(c) As to the Third Cause of Action, in favor of Bank Cantrade, A.G. in the face amount of $250,000, plus interest computed pursuant to the provisions of the Bonods, and all costs and disbursements of this action; and

(d) Such other relief as this court deems appropriate, including pre-judgment interest.

Dated: New York, New York
October 11, 1989

/s/ _____

RICHARD W. CUTLER
Attorney for Defendants
342 Madison Avenue
New York, New York 10173
(212) 949-4676

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 6926 (JES)

WELTOVER INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Plaintiffs,

—against—

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Defendants.

STATE OF NEW YORK)
:ss.
COUNTY OF NEW YORK)

AFFIDAVIT

Daniel Marx, being duly sworn, deposes and says:

1. I am the Argentine Financial Representative located in Washington, D.C. My main responsibilities are to represent the Argentine economic authorities abroad in their various relations with commercial banks, other private creditors, multilateral international organizations and foreign governments. I make this affidavit in support of the motion by the Republic of Argentina (the "Republic") and Banco Central to dismiss the Complaint in this action.

2. The instruments for which the plaintiffs seek payment in this action are Registered Bonds Denominated in United States Dollars ("Bonods"). The Bonods were issued by Banco Central in its capacity as financial agent for the

Republic. A true copy of a sample Bonod, enlarged for the convenience of the Court, is annexed hereto as Exhibit A. As explained below, payment of principal and interest on these instruments is not possible at this time and the Bonods have been rescheduled by Banco Central as a result of the Republic's severe shortage of foreign exchange and overall economic crisis.

3. The Bonods were issued in 1982 as part of the Republic's foreign exchange insurance contract program ("FEIC"). The FEIC was created by Banco Central during a period of severe devaluation of the Argentine currency in connection with its responsibilities of regulating the Republic's foreign exchange reserves. Annexed hereto as Exhibit D is a true copy of Banco Central Communication "A" 31, the implementing legislation for the FEIC, which is referenced on each Bonod. Also annexed, as Exhibit E, are true copies of Communications "A" 54, "A" 61, and "A" 76, issued by Banco Central to provide further details as the program was expanded.

4. An understanding of the FEIC requires some understanding of foreign exchange and the critical role it plays in the economies of nations like Argentina. When individuals or businesses in the United States seek to make purchases overseas for import to this country, they can make payment in their own currency because the U.S. dollar is accepted in the international marketplace as a medium of exchange. As with most other countries, that is not true in Argentina, however, because Argentine currency[1] is not considered an international currency. Thus, in order for Argentine entities or individuals to acquire products or services from other countries, they must obtain needed dollars or other acceptable currency. This generally is accomplished through one of several ways:

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1 Prior to 1985, Argentina's currency was based on the peso. Today, Argentina's currency is known as the austral.

(1) Earnings from Argentine exports.—By selling goods on the international market, dollars or other currencies can be obtained.

(2) Loans from international organizations.—These include the IMF, World Bank and Inter-American Development Bank.

(3) Loans from other governments.—This includes direct loans and private sector loans guaranteed by governments.

(4) Loans from commercial banks.

(5) Loans or credits from non-banks.

5. Because of the central importance of foreign exchange to a nation's economic policy and development, and the need to ensure the availability of adequate foreign exchange to fulfill sovereign obligations, inflows and outflows of foreign exchange in nearly all countries are carefully controlled and subject to numerous regulations. This is true of Argentina, where detailed regulations reflecting the country's economic policies govern foreign exchange transactions. Banco Central, as the Central Bank of the Republic, serves as an advisor to the Ministry of Economy and executes the economic and foreign exchange policies promulgated by the national government in this area. A true copy of Banco Central's Charter is annexed hereto as Exhibit F.

6. The severe economic crisis that currently plagues Argentina relates back to the late 1970s when, like a large number of sovereigns that had limited internal capital markets, Argentina obtained funds from external sources in order to improve its economy. The private sector as well as the public sector borrowed heavily from abroad. A large inflow of foreign funds, triggered in part by local interest rates higher in real terms than those abroad, ultimately overvalued the local currency. The results of these forces were disastrous and are well known. Argentina's foreign debt grew enormously; nonproductive imports increased massively; local production and exports were discouraged; and capital flight reached unheard

of proportions without a corresponding reduction of private sector debt. As explained in Banco Central's Annual Reports, capital flight amounted to nearly $10 billion for 1980 and the first quarter of 1981. At the same time, foreign debt increased by 88%. True copies of excerpts of the 1981 and 1983 Banco Central Annual Reports are annexed hereto as Exhibits G and M.

7. In order to deal with this economic crisis, the Argentine government took a number of related steps. One of these steps involved very significant and repeated devaluations of the local currency. In February 1981, Banco Central adjusted the official foreign exchange rate by a factor of 10%, and placed stringent limits on the amount of funds that could be converted at one time by any individual. In March, 1981 it instituted a program by which it could fix new foreign exchange rates daily. In June, 1981 Banco Central adjusted the official exchange rate by 30%. As one method of dealing with the devastating effect of this unprecedented devaluation of Argentina's currency, the government instituted the FEIC.

8. Under the FEIC, Banco Central created foreign exchange insurance contracts with Argentine borrowers who were obligated to repay contracts with foreign creditors in dollars. By paying on maturity a defined amount of local currency to Banco Central,[2] participants would receive the necessary dollars to repay their foreign debt when it matured. The FEIC thus ensured that sufficient foreign exchange would be available, thereby enabling the private sector to obtain foreign financing that was critical to avoiding a bankruptcy crisis within the Argentine economy. The program also assisted foreign creditors, because it removed the exchange rate risk which otherwise could seriously affect a debtor's ability to repay its obligations. A key feature of the FEIC was that the basic credit risk remained with the lender—in order for Banco Central to deliver the necessary foreign exchange, the insured debtors had to pay the contractually required amount of local currency.

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2 The required amount of local currency was based on the exchange rate at the time the contract was entered into with some adjustments.

9. The exchange insurance contracts issued under the FEIC began to mature in late 1982. By that time Argentina's economy had deteriorated further and the local currency had been subject to massive devaluations. In addition, the Republic engaged in a war in the Spring of 1982 related to the Malvinas. The result of these conditions was that the government's foreign exchange reserves were insufficient to meet its obligations under the program. Unable to deliver the dollars necessary to retire the Argentine debtors' original loans, the government issued two new types of instruments to refinance them. The first were the Bonods. The second were promissory notes, which were offered as an alternative to financial institutions and the terms of which were extensively negotiated. A total of approximately $1.2 billion in Bonods were issued in connection with the exchange insurance contracts that matured in 1982-83, and approximately $2.6 in promissory notes. Additional exchange contracts matured in 1984-85 and were refinanced for longer periods of time.

10. The terms of the Bonods were not negotiated. Rather, they were determined by the Argentine government on the basis of the prevailing circumstances and announced in a series of Decrees that are referenced on the Bonods themselves. True copies of Decrees 1334 and 1603 are annexed hereto as Exhibits B and C. Foreign creditors were given the option to maintain their relationship with the original Argentine debtors, with Bonods given in guarantee, or to accept Bonods or promissory notes as payment of the original debt. Implementation instructions for the Bonods, as well as further details regarding their terms, were set out in a series of Banco Central Communications. True copies of Communications "A" 251, "A" 278, and "A" 272 are annexed hereto as Exhibit H.

11. Among their terms, the Bonods provide for payment of principal and interest in United States Dollars, subject to a number of conditions. These conditions include, *inter alia*, restrictions on transfer and proper notice of transfer to Banco Central. Interest rates are linked to the London Interbank rate for Eurodollar deposits, and payment may be made

through transfer on the Frankfurt, London, Zurich or New York market. The Bonods announce on their face that they were to be applied only to external debt that was subject to Argentina's foreign exchange insurance program.

12. The Bonods began to mature on May 26, 1986. Because the foreign debt crisis in Argentina continued, the government was forced to continue a public-sector refinancing program in order to implement an ordered system of allocating scarce foreign exchange. In continuing cooperation with other sovereigns and with international organizations such as the International Monetary Fund, the Republic determined that adjustment of capital maturity dates was necessary.[3] A diplomatic note describing this decision was sent to the Secretary of the U.S. Treasury, James A. Baker, III, as part of the ongoing consultations between the two nations over this issue of mutual concern.

13. As set forth in Presidential Decree No. 772, the Minister of Economy was empowered to direct Banco Central to establish alternative mechanisms to handle maturities of the instruments issued in connection with the FEIC. A true copy of Decree 772 is annexed hereto as Exhibit I. Pursuant to those instructions, Banco Central was instructed to extend the capital maturity dates of the Bonods. A true copy of the Ministry of Economy Resolution dated May 23, 1986 is annexed hereto as Exhibit J. Banco Central, in turn, acting as financial agent of the Republic, announced a rollover of principal installments subject to an adjustment of interest rates. A true copy of Banco Central's telex to the world banking community is annexed hereto as Exhibit K.

14. A subsequent rescheduling was implemented as part of the Republic's 1987 Financing Plan. Included in this restruc-

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3 Argentina had been involved in a series of refinancing programs since 1982. These programs also included new money loans from official agencies as well as from commercial banks as described below. Under the 1984-85 program, commercial banks refinanced various principal maturities and lent $4.2 billion in new money. Under the 1987 program all existing public sector external debt was refinanced over a 19 year period (including 7 years of grace), and $1.95 billion in new commercial bank loans were made.

turing are new commercial bank loans to the Republic; restructuring of approximately $30 billion in existing public and private debt; agreements concerning trade and money market lines to Argentine entities; a debt-to-equity conversion program which allows for conversion of Argentine public debt into equity investments in Argentina; new loans from the IMF and World Bank; and the rescheduling of debts accrued to other governments. Attached hereto as Exhibit L is a true copy of the Argentine Republic's 1987 Financing Plan. Pursuant to this plan and the persistent circumstances that called for the implementation of the rescheduling, foreign exchange controls today are in place which preclude the payments plaintiffs ask the Court to compel. Annexed hereto as Exhibit N is a true copy of Presidential Decree 1379.

/s/ DANIEL MARX
Daniel Marx

SWORN TO BEFORE ME THIS
4TH DAY OF APRIL, 1990

/s/ STEPHEN C. STECKEL
Notary Public
STEPHEN C. STECKEL
NOTARY PUBLIC,
STATE OF NEW YORK
NO. [ILLEGIBLE]
Qualified in Kings County
Commission Expires August [#], 1991

U$S 100.000

REPUBLICA ARGENTINA

[SEAL]

0301330

BONOS NOMINATIVOS
EN
DOLARES ESTADOUNIDENSES

1ª serie

Spanish Text

This Bond is issued to the order of BANCO NACION ARGENTINA BS. AS. (FONDOS CIRC. 1165 RC901 BCRA) in SETTLEMENT of a debt of ACINDAR IND. ARGENTINA DE ACEROS.

It is issued by Banco Central de la Republica Argentina in its capacity as Financial Agent for the State on behalf of which it shall proceed to pay financial services hereon exclusively to the registered holder hereof in whose favor this Bond is issued, regardless of the capacity in which it was delivered to him.

According to the terms set forth in Article 3, paragraph b) of Decree 1334/82, the nominal value of this Bond is fixed as per the following table:

JA 20

May 26th,	**1983**	**U.S.$**	**100,000**
November 26th,	**1983**	**U.S.$**	**100,000**
May 26th,	**1984**	**U.S.$**	**100,000**
November 26th,	**1984**	**U.S.$**	**100,000**
May 26th,	**1985**	**U.S.$**	**100,000**
November 26th,	**1985**	**U.S.$**	**100,000**
May 26th,	**1986**	**U.S.$**	**75,000**
November 26th,	**1986**	**U.S.$**	**50,000**
May 26th,	**1987**	**U.S.$**	**25,000**

The last amount shall be payable starting from November 26th, 1987.

Buenos Aires, November 26th, 1982.

[signature]
PRESIDENTE

[signature]
GERENTE
FINANZAS PUBLICAS

[signature]
GERENTE GENERAL

100.000

FECHA DATE	CESION A NOMBRE DE ASSIGNMENT IN FAVOR OF	DOMICILIO ADDRESS	BANCO DONDE EFECTUAR LA TRANSFERENCIA BANK TO WHICH TRANSFER SHALL BE MADE	CUENTA CORRIENTE Nº. CURRENT ACCOUNT No.	FIRMAS SIGNATURES
		[Handwritten	notations]		

NOTA: Estas cesiones deberan efectuarse con arreglo a las previsiones contempladas en las Communicaciones "A" 272 y "A" 278 del Banco Central de la Republica Argentina, del 11 y 26 de enero de 1983.

NOTE: These assignments shall be effected in accordance with provisions in Communiques A 272 and A 278 of Banco Central de la Republica Argentina dated January 11th and 26th, 1983.

REGISTERED BONDS DENOMINATED IN UNITED STATES DOLLARS

Buenos Aires, November 26th, 1982

WHEREAS the maturity date of the external obligations subject to exchange insurance taken in accordance with the systems published through the Communique "A" 31 dated June 5th, 1981, of BANCO CENTRAL DE LA REPUBLICA ARGENTINA and the possibility that the debtors and creditors of said commitments may have failed to reach an agreement to renew them, and the power granted by Article 33 of Law No. 11.672, text substituted by Decree-Law No. 16.911/66, to the National Executive Power to issue bonds.

THE PRESIDENT OF THE ARGENTINE NATION DECREES:

ARTICLE 1—BANCO CENTRAL DE LA REPUBLICA ARGENTINA, in its capacity as Financial Agent for the National Government shall proceed to issue foreign public debt bonds, in one or several series, referred to as "REGISTERED BONDS DENOMINATED IN UNITED STATES DOLLARS", denominated in dollars of the UNITED STATES OF AMERICA, at a floating interest rate, for a term of FIVE (5) years and for the amount required to meet the operations referred to in Article 2 below.

ARTICLE 2—The bonds shall be applied to the settlement of the foreign obligations of debtors who have made exchange insurance agreements with BANCO CENTRAL DE LA REPUBLICA ARGENTINA, under the system of its Communiques "A" 31 dated June 5th, 1981, "A" 54 dated August 14th, 1981, "A" 61 dated September 24th, 1981, and "A" 76 dated November 30th, 1981.

ARTICLE 3—The bonds shall have the following characteristics:

a) Interest: It shall be payable semi-annually in arrears. The first maturity shall take place SIX (6) months

after the issue date. The annual interest rate on bonds shall be equal to the annual interest rate prevailing in the London interbank market for ONE HUNDRED AND EIGHTY (180) days, Eurodollar deposits. Said rate shall be fixed by BANCO CENTRAL DE LA REPUBLICA ARGENTINA on the basis of the average resulting from the rates reported by the correspondent banks in said market, at the closing of the operations on the business day prior to the beginning of each interest period. BANCO CENTRAL DE LA REPUBLICA ARGENTINA may fix, at the time of ordering the issuance of each series, an additional rate that shall be added to the rate referred to in above paragraph.

b) Repayment: It shall be effected on each bond in FOUR (4) semi-annual and successive installments of TWENTY-FIVE PERCENT (25%) each, the first installment to mature after a term of not less than FORTY-TWO MONTHS (42) from the issue date.

c) Ownership and marketability: The bonds shall be issued as registered securities, in favour of the foreign creditors whose credits are repaid under the provisions of Article 2 above.

Their transfer shall be informed by the transferor, identifying the name and address of the transferee and the number of each certificate transferred.

The bonds shall not be transferred, for any reason whatsoever, to persons domiciled or resident in the Republic of Argentina.

The bonds shall not be publicly offered within the territory of the Republic of Argentina—with the exception of the offer made by the issuer at the time of the first placement—nor subject to operations involving person resident or domiciled in the country. For the purposes of provisions of this subsection, public offer is construed as provided in Article 16 of Law No. 17.811.

BANCO CENTRAL DE LA REPUBLICA ARGENTINA and the SECURITIES COMMISSION, in the areas of their pertinent jurisdictions, shall control the compliance with the provisions of the paragraph immediately above.

d) Financial Services: They shall be paid by BANCO CENTRAL DE LA REPUBLICA ARGENTINA in United States Dollars through transfer on the New York, Frankfurt, London or Zurich markets, at the option of the bondholder, to the credit of the account opened to his name, which he shall specify at the time of subscription or on the occasion provided in the second paragraph of subsection c) of this article, 30 days before the time of each service.

BANCO CENTRAL DE LA REPUBLICA ARGENTINA is hereby empowered to appoint paying agents to meet bond services.

e) Placement and Price: In the manner, under the conditions and at the intervals to be determined by BANCO CENTRAL DE LA REPUBLICA ARGENTINA.

f) Advance Redemption: The SECRETARIAT of the TREASURY is hereby empowered to order the advance redemption of all or part of the bonds to be issued, for the value of the unpaid capital plus accrued interest.

g) Tax Exemptions: The services shall be paid without any deduction whatsoever for any present of future liens, taxes or duties, in force in Argentina.

h) Nominal Value of Certificates: They shall be printed for a nominal value of not less than FIVE THOUSAND UNITED STATES DOLLARS (US$ 5,000).

BIGNONE
DECREE NO. 1334/82 JORGE WEHBE

Buenos Aires, December 21th, 1982

WHEREAS provisions of Decrees No. 1334 dated November 26th, 1982, No. 1336 dated November 26th, 1982 and Communique "A" 251 dated November 17th, 1982 of Banco Central de la Republica Argentina

THE PRESIDENT OF THE ARGENTINE NATION DECREES:

ARTICLE 1—Registered Bonds denominated in United States Dollars and Public Debt Securities provided for in Decrees Nos. 1334 and 1336 respectively, both dated November 26th, 1982, besides being applied to the settlement of foreign debts described under Article 2 of both decrees, may be also delivered by Banco Central de la Republica Argentina to creditors as guaranty for the performance of the debtor's obligations refinanced by the parties to the loan agreement.

ARTICLE 2—Banco Central de la Republica Argentina may agree and resolve as to how to evidence that Public Debt Bonds or Securities, Decrees Nos. 1334 and 1336 dated November 26th, 1982 respectively, are delivered as guaranty. Banco Central de la Republica Argentina to the extent its own property is not affected, and acting in its capacity as Financial Agent for account and order of the National State, may also provide for other mechanisms to guarantee the performance of obligations of debtors who paid the exchange insurance amount in pesos.

ARTICLE 3—Banco Central de la Republica Argentina is hereby entitled to deliver to local financial institutions who are creditors of obligations described in Articles No. 2 both of Decree No. 1334 and Decree No. 1336 dated November 26th, 1982, Public Debt Bonds or Securities contemplated therein. Such delivery shall be made, as the case may be, in settlement or in guaranty for the performance of above obligations. In such events, the local financial institutions shall

not assign, transfer or endorse such bonds or obligations in the country; however, such institution is authorized to give them to its creditors abroad in payment, assignment or guaranty.

DECREE NO. 1603/82 — BIGNONE
JORGE WEHBE

Buenos Aires, January 24th, 1983

WHEREAS the provisions of National Executive Power Decrees 1334/82, 1335/82 and 1336/82, the report submitted in File No. 101,409/82 and the advice given by the General Management:

THE PRESIDENT OF BANCO CENTRAL DE LA REPUBLICA ARGENTINA RESOLVES:

3. The "REGISTERED BONDS DENOMINATED IN UNITED STATES DOLLARS"—First Series, is hereby issued on November 26th, 1982 according to the characteristics set forth in Decree No. 1334 dated November 26th, 1982 in the amount of TWO BILLION UNITED STATES DOLLARS NOMINAL VALUE (US$ 2,000,000,000 nominal value), to be distributed in sheets in denominations of US$ %<))): US$ 10,000; US$ 25,000; US$ 50,000 and US$ 100,000.

6. To the purposes established in Decree No. 1334/82, Article 3, paragraph a) ("REGISTERED BONDS DENOMINATED IN UNITED STATES DOLLARS"), and in Decree No. 1336/82, Article 3, paragraph b) (United States Dollars obligations of the National Government), an additional rate mentioned in above paragraphs of two points is set in excess of the interest rate p.a. to be established for the appropriate issues at commencement of each interest period.

RESOLUTION No. 46 — JULIO GONZALEZ DEL SOLAR

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. 728 (pages 1-9) is an accurate, true and complete rendition from Spanish into English of Decrees 1334, 1335, 1336, 1339, 1341 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4TH DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

DECREE 1334

Public Debt—Registered bonds in United States dollars—Authorization of their issuance to cancel foreign obligations of debtors who contract exchange insurance under the system of communications A 31/81, A 54/81, A 61/81 and A76/81 (B.C.)

Date: November 26, 1982
Publication: Official Gazette 12/3/82

Legal citations: communication A 31/81 (B.C.): XLI-B, 2065; communication A 54/81 (B.C.): XLI-C, 3312; communication A 61/81 (B.C.): XLI-D, 4603; communication A 76/81 (B.C.): XLI-D, 4616; law 17.811: XXVIII-B, 1979.

Art. 1—The Central Bank of the Argentine Republic, in its capacity as financial agent of the national government, shall issue foreign public debt securities, in one or several series, entitled "Registered Bonds in United States Dollars," in United States dollars, with a variable rate of interest, at a term of five (5) years and for the amount necessary to handle the transactions referred to in art. 2 hereof.

Art. 2—The securities shall be for the purpose of cancelling the foreign obligations of those debtors who may have contracted exchange insurance with the Central Bank of the Argentine Republic, under the system of its communications A 31 of June 5, 1981, A 54 of August 14, 1981, A 61 of September 24, 1981 and A 76 of November 30, 1981.

Art. 3—The securities shall conform to the following characteristics:

a) Yield: This is paid semi-annually per periods matured. The first maturity shall occur six (6) months after the issuance date.

The annual rate of interest that the securities will earn shall be equal to the annual rate in effect for Eurodollar deposits at one hundred eighty (180) days on the London interbank market. Said rate shall be established by the Central Bank of the Argentine Republic based on the average of the rates

reported by correspondent banks on that market at the close of transactions on the working day prior to the day on which each yield period begins.

At the time each series is issued, the Central Bank of Argentina may establish a surcharge to be added to the rate indicated in the preceding paragraph.

b) Amortization: This shall be done on each security in four (4) semi-annual and successive instalments of twenty-five percent (25%) each, the first falling due no later than forty-two months (42) after the date of issuance.

c) Title and marketability: They shall be issued as registered in the name of the foreign creditors whose credits are cancelled pursuant to art. 2 hereof.

Their transferal must be reported by the transferor, identifying the name and domicile of the recipient and the number of each certificate transferred. They may not be transferred, for any reason, to persons domiciled or residing within the Argentine Republic.

The securities may not be the subject of a public offering within the territory of the Argentine Republic—except for the offering made by the issuer at the time of the initial placement—nor the subject of transactions involving persons residing or domiciled within the country. For the purposes stipulated in this paragraph, a public offering shall be considered to be that provided in art. 16 of Law 17.811.

The Central Bank of the Argentine Republic and the Securities Commission, within the scope of their respective jurisdictions, shall see to it that the provision of the preceding paragraph is observed.

d) Financial services: These shall be paid for by the Central Bank of the Argentine Republic in United States dollars by transferal on the New York, Frankfurt, London or Zurich markets at the holder's option for credit into the account open in its name, which it will individualize at the time of

subscription or at the time provided in section 2 of paragraph c) of this article, 30 days prior to the date of each service.

The Central Bank of the Argentine Republic shall be empowered to appoint paying agents to handle the security services.

e) Placement and price: In the forms, under the conditions and with the frequency determined by the Central Bank of the Argentine Republic.

f) Early redemption: The Secretariat of the Treasury shall be empowered to order the early redemption of all or part of the securities issued, for the value of the principal owed plus interest accrued.

g) Tax exemptions: The services shall be paid for without making any deduction due to assessments, taxes or rates, present or future, in effect within the Republic.

h) Face value of the certificates: They shall be printed for a face value of no less than five thousand United States dollars (US$ 5,000).

i) Printing of the certificates: Through the Mint of the Nation or by contracting with private companies, which may be more suitable to the needs of issuance, the securities shall be printed and issued according to the numbering indicated by the Central Bank of the Argentine Republic and the respective numerical registers shall also be made up.

Similarly, unnumbered certificates shall be printed in the quantities and at the times that the aforesaid Bank indicates, for the purpose of replacing lost or unusable securities.

While the certificates are being printed, the Central Bank of the Argentine Republic may issue evidences representing the securities, which shall be exchanged in due time for the definitive securities.

Art. 4—The Central Bank of the Argentine Republic shall inform the General Accounting Office of the Nation of the

numbering, amount, term and other financial characteristics of the securities it issues.

Art. 5—The Central Bank of the Argentine Republic shall agree with the Secretariat of the Treasury on the latter's accounts to be debited to handle the financial services and costs engendered by issuance of the securities.

Art. 6—The Central Bank of the Argentine Republic shall collect a commission of one tenth percent (0.1%) on the securities amount invested.

Art. 7—The General Accounting Office of the Nation shall conduct the audit in accordance with its jurisdiction.

Art. 8—Communicate, etc.—Bignone—Wehbe.

* * * *

DECREE 1336

Public debt—Authorization for the Central Bank of the Argentine Republic to issue registered securities in United States dollars for the purpose of cancelling the foreign obligations of debtors contracting exchange insurance under the system of communications A 31/81, A 54/81, A 51/81 and A 76/81 (B.C.).

Date: November 26, 1982
Publication: Official Gazette 12/3/82

Legal citations: communication A 31/81 (B.C.): XLI-C, 2065; communication A 61/81 (B.C.): XLI-D, 1603; communication A 76/81 (B.C.): XLI-D, 4616; law 17.811: XXXVIII-B, 1979, law 16.432, XXI-A, 282; law 20.548: XXXIII-D, 3657; communication A 54/81 (B.C.); XLI-C, 3312.

Art. 1—The Central Bank of the Argentine Republic, in its capacity as financial agent of the national government, shall be empowered to issue foreign public debt securities, registered in United States dollars, for the amount necessary to handle the transactions referred to in art. 2 hereof.

Art. 2—The securities shall be for the purpose of cancelling the foreign obligations of those debtors who may have contracted exchange insurance with the Central Bank of the Argentine Republic under the system of its communications A 31 of June 5, 1981; A 54 of August 14, 1981, A 61 of September 24, 1981 and A 76 of November 30 of 1981.

Art. 3—The securities to be issued shall conform to the following characteristics.

a) Amortization: This shall be done is four (4) semi-annually instalments of twenty-five percent (25%) each, the first maturing no later than at thirty-six (36) months from the issuance date of each security. In the event that they are applied to cancel exchange insurance after September 30, 1983, the Central Bank of the Argentine Republic is empowered to establish other conditions of amortization.

b) Yield: This shall be paid semi-annually per periods matured. The first maturity shall occur at six (6) months from the issuance date. The annual rate of interest that the securities will yield shall be equal to the annual rate in effect for Eurodollar deposits at one hundred eighty (180) days on the London interbank market.

Said date shall be established by the Central Bank of the Argentine Republic based on the average of the rates reported by its correspondent banks on that market at the close of transactions on the working day prior to the day on which each yield period begins.

The Central Bank of the Argentine Republic shall be empowered, at the time each security is issued, to set a surcharge to be added to the rate established in the immediately preceding paragraph.

c) Title and marketability: They shall be issued in the name of the foreign creditors whose credits are cancelled in accordance with art. 2 hereof.

They may be transferred only to financial entities domiciled abroad.

Their transferal must be reported by the transferor, identifying the name and domicile of the recipient.

They may not be transferred, for any reason, to persons domiciled or residing within the Argentine Republic.

The securities may not be the subject of a public offering within the territory of the Argentine Republic—except for the offering made by the issuer at the time of the initial placement—nor the subject of transactions involving persons residing or domiciled within the country. For the purposes stipulated in this paragraph, a public offering shall be considered to be that provided in art. 16 of law 17.811.

The Central Bank of the Argentine Republic and the Securities Commission, within the scope of their respective jurisdictions, shall see to it that the provision of the preceding paragraph is observed.

d) Financial services: These shall be for by the Central Bank of the Argentine Republic in United States dollars by transferal for credit into the account that the recipient shall individualize at the time of subscription or at the time provided in section 2 of paragraph c) of this article, 30 days prior to the date of each service.

The Central Bank of the Argentine Republic shall be empowered to appoint paying agents to handle the security services.

e) Placement and price: In the forms, under the conditions and with the frequency determined by the Central Bank of the Argentine Republic.

g) Tax exemptions: The services shall be paid for without making any deduction due to assessments, taxes or rates, present or future, in effect within the Republic.

g) Jurisdiction: The Central Bank of the Argentine Republic shall be empowered to grant the extension of jurisdiction in accordance with art. 48 of law 16.432, amended by art. 7 of law 20.548, in favor, exclusively and in joint or indistinct

fashion, to the Courts of London, New York, Tokyo or Frankfurt.

Art. 4—The Central Bank of the Argentine Republic shall inform the Office of the Treasury and the General Accounting Office of the Nation of the numbering, amount, term and other financial characteristics of the securities that it issues.

Art. 5—The Central Bank of the Argentine Republic shall agree with the Secretariat of the Treasury on the accounts of the latter to be debited to handle the financial services and costs engendered by the issuance of the securities.

Art. 6—The Central Bank of the Argentine Republic shall receive a commission of one tenth percent (0.01%) on the securities amount invested.

Art. 7—The General Accounting Office of the Nation shall conduct the audit in accordance with its jurisdiction.

Art. 8—Communicate, etc.—Bignone—Wehbe.

* * * *

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S165E/1 is an accurate, true and complete rendition from Spanish into English of Decree 1603 (page 040005) to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4TH DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

DECREE 1603

Public debt—Registered bonds in United States dollars meant to cancel foreign obligations of debtors who contracted foreign exchange insurance stipulated in decrees 1334/82 and 1336/82—Possibility of delivering them in quarantee or cancellation to local financial entities which are creditors of the obligations.

Date: December 21, 1982
Publication: Official Gazette 12/24/82

Legal citations: D. 1334/82: XLII-D, 3809; D. 1336/82: XLII-D, 3812.

Art. 1.—Registered bonds in United States dollars and the public debt securities considered in decrees 1334 and 1336, respectively, both dated November 27, 1982, in addition to being intended to cancel the foreign obligations described in Art. 2 of both decrees, may also be delivered by the Central Bank of the Argentine Republic to creditors to guarantee performance of the debtor obligations refinanced by the parties to the mutual contract.

Art. 2.—The Central Bank of the Argentine Republic may arrange and determine the form in which it shall verify the circumstances in which the bonds or public debt securities—decrees 1334 and 1336 of November 26, 1982 respectively—are delivered in guarantee. The Central Bank of the Argentine Republic, insofar as it does not allocate its own assets and acts as Financial Agent on behalf of the National State, may also provide other mechanisms to guarantee the performance of the obligations of the debtors who have paid, in pesos, the amount corresponding to the foreign exchange insurance.

Art. 3.—The Central Bank of the Argentine Republic is authorized to deliver to local financial entities which are creditors of the obligations described in Arts. 3 of Decrees 1334 and 1336 of November 26, 1982 the bonds or public debt securities considered therein. Such surrender shall be done, as appropriate, to cancel or to guarantee performance of the

aforementioned obligations. In such cases, the local financial entity may not give, assign or endorse the bonds or securities inside the country; in exchange, it is authorized to give them in payment, assignment or guarantee to their creditors abroad.

Art. 4.—The peso amounts that the Central Bank of the Argentine Republic obtains from those debtors abroad that have contracted foreign exchange insurance with this institution, by cancellation thereof, shall be allocated to diminish the obligations of the National Government vis-a-vis the Central Bank of the Argentine Republic.

Art. 5.—Let it be communicated, etc.—Bignone—Wehbe.

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S03090-140E is an accurate, true and complete rendition from Spanish into English of Communication "A" 31 of 6/5/81 and Communication "A" 251 of 11/17/82 to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ MIKAEL E. POULSEN
By Mikael E. Poulsen
Director

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 14TH DAY OF MARCH, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

COMMUNICATION "A" 31 6/5/81

TO FINANCIAL ENTITIES AUTHORIZED TO TRADE IN FOREIGN EXCHANGE AND FOREIGN-EXCHANGE BROKERS:

Ref.: Circular EXCHANGE OPERATIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY—CAMEX-1-2

We are contacting you and, through you, all interested parties, to inform you that, in accordance with the economic policy guidelines announced by the authorities, this Bank has resolved to implement foreign-exchange insurance—in U.S. dollars—to cover financial loans in foreign currency of the private sector, which are contracted or renewed as of today, under the conditions specified and with terms of under 540 days, taking the date of the first amortization payment for this purpose.

1. *New Loans*

The intervening entities authorized to trade in foreign exchange shall negotiate for cash the amount in foreign currency that the borrowers take in, transferring the currencies to the Central Bank at the same exchange rate. Simultaneously, they may contract foreign-exchange insurance with this Institution for the same amount.

2. *Renewals*

This standard also applies to loans received and traded in the foreign-exchange market which, by successive extensions, mature or have matured as of 6/1/81.

Exclusively upon maturity of the obligation, established originally or derived from renewals declared in timely fashion

and form per the applicable standards (foreign-exchange declarations and ongoing survey of obligations vis-a-vis foreign parties), they may contract, with this Bank, the respective foreign-exchange insurance for the renewal amount.

3. *Terms of Foreign-Exchange Insurance*

These terms shall be contracted pursuant to the established amortization dates, and may not be less than 540 days.

Transactions with terms longer than two years shall be considered by this Bank on a case-by-case basis.

4. *Rate of Foreign-Exchange Insurance*

For the first 180 days, a fixed rate shall be applied over the seller exchange rate that this Bank communicates for such purpose each day when the market opens, and for the remaining period the rate resulting from the variation of the wholesale prices, general level, deducting international inflation, shall be applied.

Interest shall be paid at the end of each six-month period.

5. *Operating System*

Transactions shall be contracted directly with this Bank through the foreign-exchange switchboard.

6. *Information and Survey System*

Foreign-exchange transactions with clients must be declared on form 4001A (cash purchase), 4002A (credit sale) and 4004B (liquidation) stating in all cases, in the appropriate space, the phrase "COMMUNICATION "A" 31."

On new loans, forms 4001A and 4002A must absolutely contain the number of form 3191 submitted in compliance with the standards on survey of obligations vis-a-vis foreign parties, which will be returned, attached to 4004B, upon liquidation of the transactions.

Renewals must comply with the information system provided for financial loans, reporting on the declaration forms the number assigned to the new form 3191 modifying the pre-

vious one, which will be added to form 400B at the time of liquidation.

The balancing entries with the Central Bank shall be reported on form 116, in duplicate, separately from the other transactions between entities or with this Institution.

7. *Intervening Authorized Entities*

The transactions referred to in these provisions may only be conducted through the entities authorized to trade in foreign exchange, which are approved, pursuant to current standards, to conduct credit transactions.

Sincerely,

CENTRAL BANK OF THE ARGENTINE REPUBLIC

[signature]

Antonio E. Conde
Manager, Foreign
and Foreign Exchange

[signature]

Evaristo H. Evangelista
Asst. General Manager

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S165E1/2 is an accurate, true and complete rendition from Spanish into English of COMMUNICATION "A" 54 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4 DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

COMMUNICATION "A" 54 8/14/81

TO FINANCIAL ENTITIES AUTHORIZED TO TRADE IN FOREIGN EXCHANGE AND FOREIGN-EXCHANGE BROKERS:

Ref.: Circular EXCHANGE OPERATIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY—CAMEX-1-9

We are contacting you and, through you, the interested sectors, to inform you that, with reference to the provisions covering foreign exchange insurance publicized by Communications "A" Nos. 31-35-36 and 44, CAMEX Circulars 1-2; 1-4; 1-5 and 1-8, that this Bank has resolved to consider, effective today, petitions in connection with the early application of said standards to maturities of financial loans in foreign currency, received and traded on the exchange market prior to 6/22/81, which take effect within 180 days following submittal of said petitions.

When submitting requests on forms 4008A, sufficiently in advance, interested parties must meet the following requirements:

1. Extend the terms of the loans under such conditions for a period of at least 540 days from the date of each maturity to which the foreign exchange insurance will be applied.

2. Consequently, the insurance will cover the term from the date of its authorization and arrangement with this Bank until the date of the maturity that results by application of point 1 above.

3. Provide, on the respective petition, all the data pertaining to the loan transactions involved, indicating the number

and date of forms 3191 or 3189—as appropriate—corresponding to the declaration on the on-going survey of obligations with foreign parties and ratify, under sworn statement, that the debts have not been cancelled by any process.

The following rates will apply to the transactions formalized pursuant to these standards:

a) For the first 180 days of the insurance, the fixed rate that the Central Bank communicates each day pursuant to the provisions of Communication "A" 31, point 4.

b) For the remaining period, the rate pursuant to the provisions of Communications "A" Nos. 36 and 44 shall apply.

Sincerely,

CENTRAL BANK OF THE ARGENTINE REPUBLIC

[signature]

Antonio E. Conde
Manager, Foreign
and Foreign Exchange

[signature]

Evaristo H. Evangelista
Asst. General Manager

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S165E1/3 is an accurate, true and complete rendition from Spanish into English of COMMUNICATION "A" 61 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4 DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

COMMUNICATION "A" 61 9/24/81

TO FINANCIAL ENTITIES AUTHORIZED TO TRADE IN FOREIGN EXCHANGE AND FOREIGN-EXCHANGE BROKERS:

Ref.: Circular EXCHANGE OPERATIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY—CAMEX-1-10

We are contacting you and, through you, the interested parties, to inform you that this Bank has resolved to establish a system of foreign exchange insurance—in United States dollars—consisting of contracting it in advance to cover debts due to financial loans in foreign currency, of the private sector, maturing on or before 12/31/83.

1. *Scope*

The system is applicable to the following transactions:

1.1 Financial loans in effect as of 6/30/81 received and traded on the exchange market until 6/19/81 inclusive, with maturities occurring until 12/31/83 and that, when these occur, they are extended for a minimum term of 540 days and a maximum of 3 years.

1.2 Foreign exchange insurance can only be contracted on 50% (fifty percent) of the total amount of the financial-loan indebtedness of each company, effective as of 6/30/81 and recorded at this Bank pursuant to the system of the on-going survey of obligations with foreign parties.

Thus, in those cases where, by application of the provisions of Communications "A" 31 and 54, the amount in

effect as of 6/30/81 includes transactions already covered by foreign exchange insurance, the present provisions shall apply only to the remaining transactions until 50% of the total debt is covered.

Insurance transactions concluded prior to the date of this circular may be supplemented, as far as term is concerned, until the maximum referred to in point 1.1 is reached.

1.3 In addition to the principal, the foreign exchange insurance may cover the interest accrued until the maturity that gives rise to said contract, provided that the payment of this interest is extended until it coincides with the reimbursement of the principal, i.e. at the end of the foreign exchange insurance.

Under equal conditions, foreign exchange insurance may be contracted for future interest, insofar as the payment of it is extended until the reimbursement of the principal when the foreign exchange insurance is liquidated. In this case, for the interest, on each occasion, an exchange contract will be executed for the corresponding amount and pursuant to the provisions of point 3, effective at this time, without requiring prior authorization for it.

The interest to be insured will be for the net amount payable to the lender, i.e. excluding any local charge (income tax payable by the lender, etc.) and half-yearly calculation of it to coincide with foreign exchange insurance application periods.

1.4 It is not applicable to:

1.4.1. Personal debts, except for those of personal companies engaged in an economic activity.

1.4.2. Debts due to prefinancing or financing of exports nor to debts arising from loans applied directly abroad to the financing of imports.

2. *Term*

The foreign exchange insurance will cover the period from the date on which it is contracted until the date resulting from the extension referred to in point 1.1.

3. *Foreign Exchange Insurance Rate*

On the seller exchange rate that this Bank communicates for this purpose each day when the market opens, a fixed rate will be applied, for the first 180 days, which will also be communicated daily, and for the remaining period the borrowers may decide at that time, between the rate resulting from the variation in the wholesale prices, general level, minus the international inflation (Communication "A" 36 of 6/17/81) and the rate resulting from the difference by quotient between the rates of variation in the financial adjustment index (R.F. Circular 1050) and the 30 day LIBOR rate index (Communication "A" 44 of 7/3/81).

The amount of the foreign exchange insurance rate must be paid to this Bank every six months when due.

4. *Procedure*

When submitting requests on forms 4008 A, interested parties must meet the following requirements:

4.1. Extend the terms of the loans referred to in these provisions for a period of at least 540 days from the date of each maturity to which the foreign exchange insurance will be applied.

When provided, to formalize the extensions for the terms referred to in point 1, the use of various lenders, on the foreign obligation survey form, such circumstances will be stated but also indicating that it will not alter the total term of the foreign exchange insurance with the Central Bank.

4.2. Provide, on the respective petition, all the data pertaining to the loan transactions involved, enclosing copies of forms 3189 or 3191—as appropriate—corresponding to the declaration on the on-going

survey of obligations with foreign parties and ratify, under sworn statement, that the debts have not been cancelled by any process.

4.3. Itemize the amount of the financial loan indebtedness, effective as of 6/30/81, indicating the contracting date or latest renewal date—as appropriate—of each transaction, maturity (indicating extension and new maturity for those taking effect between 7/1/81 and the date of the petition) and indicate for each one of them whether the concessions referred to in Communications "A" 31, 33 and 54 have been applied.

5. The transactions will be contracted with this Bank, directly by the Financial Entities authorized to trade in foreign exchange, through the foreign exchange switchboard.

6. *Survey and Reporting System*

Foreign exchange transactions with clients must be reported on form 4002 A (credit sale) and 4004 B (settlement), stating in all cases, in the appropriate space, the phrase "COMMUNICATION "A" 61."

Form 4002A must absolutely contain the number of form 3191 submitted in compliance with the standards on survey of obligations with foreign parties, in modification of the previous one, which will be returned, attached to 4004B, upon settlement of the transactions.

Renewals must comply with the reporting system provided for financial loans, reporting on the declaration forms the number assigned to the new form 3191 modifying the previous one, which will be added to form 4004B at the time of settlement.

The balancing entries with the Central Bank will be reported on form 116, in duplicate, separately from the other transactions between entities or with this Institution.

7. *Expiration of Contracts*

The foreign exchange insurance contracts concluded by virtue of these provisions and the provisions established in Communications "A" Nos. 31, 36, 44 and 54 shall become ineffective and be cancelled automatically upon non-payment of the insurance rate by the policyholders, only at the half-yearly completion of the set term and with no need for any summons.

8. *Intervening Authorized Entities*

The transactions referred to in these provisions may only be conducted through the entities authorized to trade in foreign exchange, in categories B and C.

Sincerely,

CENTRAL BANK OF THE ARGENTINE REPUBLIC

[signature]

Antonio E. Conde
Manager, Foreign
and Foreign Exchange

[signature]

Evaristo H. Evangelista
Asst. General Manager

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S165E1/1 is an accurate, true and complete rendition from Spanish into English of COMMUNICATION "A" 76 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4 DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

COMMUNICATION "A" 76 11/30/81

TO FINANCIAL ENTITIES AUTHORIZED TO TRADE IN FOREIGN EXCHANGE AND FOREIGN-EXCHANGE BROKERS:

Ref.: Circular EXCHANGE OPERATIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY—CAMEX-1-14

We are contacting you and, through you, the interested parties, to inform you that this Bank has resolved to expand the system of foreign-exchange insurance in U.S. dollars, established by Communication "A" 61 of 9/24/81, by allowing its application to the interest corresponding to the financial loans in foreign currency effective as of 6/30/81 even in those cases where, due to the limitation set in point 1.2 of said Communication, the principal may not benefit from foreign exchange insurance.

Consequently, the foreign exchange insurance for this interest may be contracted directly by the entities authorized to trade in foreign exchange, pursuant to current general standards and the following:

1. The foreign exchange insurance may cover the interest corresponding to loans maturing on or before 12/31/83.

2. As a condition for contracting the foreign exchange insurance, the payment of the interest must be extended for a minimum term of 540 days and a maximum of 3 years from the date of maturity of the respective obligations referred to in point 1.

3. The system is applicable to interest accrued or to accrue, in this last case when the exact (not estimated) amount is known in advance. Insurance may only be contracted on

the net amount payable to the lender, i.e. excluding any local charge (income tax payable by the lender, etc.).

4. The foreign exchange insurance will cover the period from the date on which it is contracted until the date resulting from the extension referred to in point 2.

Sincerely,

CENTRAL BANK OF THE ARGENTINE REPUBLIC

[signature]

Antonio E. Conde
Manager, Foreign
and Foreign Exchange

[signature]

Evaristo H. Evangelista
Asst. General Manager

JA 55

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

ORGANIC CHARTER
OF THE CENTRAL BANK
OF THE
ARGENTINE REPUBLIC

BUENOS AIRES
1982

JA 56

LAW No. 20.539*

Buenos Aires, September 11, 1973

CHAPTER I

Nature and Purpose

ARTICLE 1. The Central Bank of the Argentine Republic is an autarchic entity of the Nation, governed by the provisions of this law and the other concordant legal standards. Its relations with the Executive Power shall be maintained through the Ministry of Economy. The Nation guarantees the bank's obligations.

ARTICLE 2. The bank shall have its domicile in the city of Buenos Aires. It may establish branches or agencies and appoint correspondents within the country and abroad.

ARTICLE 3. The purpose of the bank shall be:

a) To regulate the credit and means of payment in order to create conditions enabling orderly and increasing economic development, with a social sense, a high degree of employment and the currency's purchasing power.

b) To execute the exchange policy outlined by the Ministry of Economy with counsel from the Central Bank and to concentrate and administer the reserves of gold, currency and other assets outside of the country.

c) To supervise the liquidity and the proper operation of the financial market and apply the law of financial entities and other standards that may be enacted in consequence thereof.

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* With the current amendments introduced by Laws Nos. 21.364 - 7/27/76 -, 21.547 - 3/14/77 -, 21.571 - 5/6/77 -, 21.757 - 3/7/78 -, 22.467 -6/23/81 - and 22.602 - 6/2/82.

d) To propitiate the development and strengthening of the capital market, and

e) To act as the State's financial agent, economic, financial, monetary and currency-exchange counsel of the National Executive Power through the Ministry of Economy of the Nation, and the country's depositary and agent before the international banking, financial and monetary institutions of which the Nation may be a member.

ARTICLE 4. The bank's activity shall conform to the general directives in matters of financial, currency-exchange, monetary and economic policy that the National Government may issue through the Ministry of Economy (Law No. 21. 364 - 7/27/76 -)

CHAPTER II

Capital

ARTICLE 5. The bank's capital shall be one hundred million pesos (100,000,000 pesos).

The National Executive Power may increase it to the extent necessary to carry out the bank's operations.

CHAPTER III

Board of Directors

ARTICLE 6. The bank shall be governed by a board of directors composed of a president, a vice-president and eight directors. They must all be native or naturalized Argentines with no less than ten years of citizenship. [page cut off] (Law No. 22.467 - 6/23/81 -)

ARTICLE 7. The president, the vice-president and the directors shall be appointed by the National Executive Power, shall hold office for four years and may be re-appointed.

The following may not serve as members of the board of directors:

a) Employees or officers of any division of the national government and those persons who may hold other positions or jobs paid or remunerated in any form, that directly or indirectly depend on the national, provincial or municipal governments, including their legislative or judicial powers. Persons involved in teaching are not included in the provisions of this paragraph;

b) Those persons who may be part of the management, administration, trusteeship of, or report to, the financial entities;

c) Those persons who may be affected by the prohibitions established in the Law of Financial Entities.

They may be removed from their posts for poor performance or for having incurred any of the prohibitions established in this article. (Law No. 22.467 - 6/23/81 -)

ARTICLE 8. Should the president, vice-president or any member of the board die, resign or in any way vacate his post before completing the period for which he was appointed, his replacement shall be appointed to complete the period in the form established in the preceding article. (Law No. 22.467 - 6/23/81 -)

ARTICLE 9. The salaries of the president, vice-president and the six board members appointed by the National Executive Power shall be those set in the bank's budget. (Law No. 21.547 - 3/14/77 -)(*)

ARTICLE 10. The president is the first executive authority of the bank and, in this capacity:

a) Exercises the upper administration of the bank;

(*) The number of board members is eight in accordance with the provisions of Law No. 22.467 of 6/23/81.

b) Acts in representation of the board of directors and convenes and presides over its meetings;

[page cut off] decrees of the Executive Power and the resolutions of the board of directors;

d) Legally represents the bank in its relations with third parties;

e) Appoints, promotes and dismisses the bank's personnel in accordance with the standards set forth by the board of directors, giving it subsequent account of the resolutions adopted;

f) Arranges the substantiation of charges made against personnel, regardless of their hierarchy, through the competent office, and

g) Acts in and resolves all those matters that are not expressly reserved to decision by the board of directors.

ARTICLE 11. When reasons of urgency so demand, the president may, furthermore, resolve matters reserved to the board of directors in consultation with the vice-president or whomever may be acting as vice-president or, at least, a director, and he must give an account to the board of directors, at the first opportunity, of the resolutions adopted in this manner. Whosoever may replace him shall possess the same power.

ARTICLE 12. The president shall convoke meetings of the board of directors at least once every fifteen days. Six members shall constitute a quorum and, save provisions to the contrary, the resolutions shall be adopted by simple majority vote of the members present. In the event of a tie, the president shall have a double vote. (Law No. 22.467 - 6/23/81 -)

ARTICLE 13. The vice-president shall act as president if the president is absent, rendered unable or vacates the post. In addition to said cases, he shall perform those duties that the president—from among his own duties—assigns him.

ARTICLE 14. The board of directors shall be responsible for:

a) Establishing the standards for organizing and managing the bank; being cognizant of the operations decided in accordance with said standards and intervening, pursuant to the regulations that it may issue, in resolving cases that have not been provided for;

b) Approving the annual budget of salaries and expenditures and the calculation of resources and bringing them to the awareness of the Ministry of Economy of the Nation; (Rescinded by Law No. 22.602 - see page 17 -)

c) Annually approving the bank's general balance sheet, profit and loss statement and annual report, all of which shall be brought to the awareness of the National Executive Power and published;

d) Determining the appropriate sums to be assigned to reserves in accordance with the provisions of Article 45;

e) Annually appointing a 2nd vice-president from among the directors, who shall be required to substitute for the vice-president in the case of temporary absence or when the vice-president is acting as president;

f) Establishing and closing branches and agencies;

g) Designating correspondents;

h) Determining the amounts, rates and other conditions of the rediscounts, advances and other credits that it may agree upon and of the obligations that it may issue;

i) Authorizing the opening of new financial entities and subsidiaries, and projects of mergers of financial entities;

j) Authorizing the financial entities for the purposes of the Law of Financial Entities;

k) Considering the stock transfers that may alter the structure of the the financial-entity shareholder groups;

l) Approving plans of regularization and stablization of the financial entities that may affect solvency or liquidity;

m) Establishing the rates of interest and commissions that the financial entities shall apply to loans and deposits and service commissions;

n) Revoking authorization to operate from financial entities when called for;

o) Issuing the regulatory standards of the Law of Financial Entities;

p) Setting the values and characteristics of the notes and coins that the bank may issue;

q) Ordering the demonetization of the notes and coins in circulation and setting the periods within which their exchange shall be accomplished;

r) Acquiring the necessary realty so that the bank may carry out its purpose and disposing of realty that is no longer needed;

s) Appointing the general manager and the assistant general managers at the proposal of the president, and

t) Dictating the bank's personnel procedures, setting the conditions of the hiring, technical training, discharge and dismissal of personnel.

CHAPTER IV

General Management

ARTICLE 15. The bank shall be administered though the general manager and the assistant general managers, all of

whom must be native or naturalized Argentines with no less than ten years of citizenship.

ARTICLE 16. The general managers and the assistant general managers are the advisors of the president, the vice-president and the board of directors. In this capacity, the general manager and, if applicable, the assistant general managers shall attend the meetings of the board of directors.

They are responsible for complying with the standards, regulations and resolutions of the board of directors and the president, for application of which, with the president's approval, they may issue the necessary internal regulations.

The general manager or the assistant general managers, if applicable, shall keep the president informed as to the bank's operation. They may be dismissed from their posts only for poor performance or for having incurred any of the prohibitions provided in the Law of Financial Entities.

CHAPTER V

Bank Transactions

ARTICLE 17. The bank is empowered to conduct the following transactions:

a) Issue notes and coins;

b) For the financial entities, rediscount documents from their credit transactions. If the documents issue from commercial, industrial or public-service enterprises belonging in full or in part to the National State, provincial states or municipalities, the rediscount may be done only when such enterprises possess a patrimony independent from their patrimony, have resources to make the payments and have adopted the necessary provisions to make them in the proper or established manner;

c) Grant advances on account to the financial entities, with collateral of public securities or other securities or

with guaranty or general or special allocation of specified assets; (Law No. 21.571 - 5/6/77 -)

d) Grant other loans to financial entities. When exceptional circumstances so warrant in the judgment of the Central Bank, these loans may be unguaranteed but it must counterbalance the solvency of the entity's patrimony and adopt measures to assure the due application of the allocated resources as well as their recovery, and (Law No. 21.571 - 5/6/77 -)

e) The sequelae of international agreements regarding payments. (Laws Nos. 21.547 - 3/14/77 - and 21.571 - 5/6/77 -)

The resources lent to financial entities through the systems provided in paragraphs b), c) and d) above shall be reimbursed to the Bank with preference over any other creditor. (Law No. 21.571 - 5/6/77 -)

ARTICLE 18. The bank may:

a) Buy and sell gold and currencies;

b) Obtain credit from abroad;

c) Grant advances guaranteed by gold coins or gold bars;

d) Receive gold in custody;

e) Act as correspondent or agent of other central banks, or represent or be part of any international entity in existence or which may be created for the purpose of financial, monetary or bank cooperation;

f) Receive deposits in national or foreign currency;

g) Issue securities or bonds, as well as certificates of participation in the public securities that it may possess and other obligations with or without special guarantees;

h) Issue, buy and sell public securities. It shall conduct these transactions exclusively for the account of the respective government and may not subscribe such securities nor guaranty their placement;

i) Buy and sell in the public securities market for the purpose of regulation. The bank may invest in these transactions up to 15% of the circulating amount of public securities currently negotiable on the market, but such limit may be increased by the allocation of special reserves or, in emergency cases, with the unanimous vote of the members of the board of directors.

ARTICLE 19. The bank is prohibited from:

a) Granting loans to the National Government, without prejudice to the transactions authorized by Articles 19, paragraph i); 29 and 51; (Law No. 21.547 - 3/14/77 -)

b) Grant loans to provinces, municipalities or autarchic divisions dependent thereof;

c) Guaranty or endorse drafts or other obligations of the national government, provinces, municipalities, autarchic divisions or similar institutions;

d) Grant unguaranteed advances or grant overdraft credits, except in the case of credit agreements concluded with other central banks; (Law No. 21.547 - 3/14/77 -)

e) Purchase realty, except that which may be necessary for it to be able to carry out its activities;

f) Buy shares, except those corresponding to international financial entities;

g) Participate directly or indirectly in any commercial, agricultural, industrial or other enterprise, except for the case stipulated in the preceding paragraph, and

h) Grant loans to individuals or legal entities not authorized to operate as financial entities, except for the cases provided for in Articles 18, paragraph i); 29 and 51.

CHAPTER VI

Issuance of Money and Reserve of Gold and Currencies

ARTICLE 20. The bank is exclusively in charge of issuing notes and coins of the Argentine Nation and no other agency of the national government, nor provincial governments nor municipalities, banks or other institutions of any sort may issue notes or metallic coins or other instruments that might circulate as money.

ARTICLE 21. The bank's notes and coins shall be legal tender throughout the territory of the Argentine Republic for the amount expressed on them. Notes shall bear the facsimile of the signature of the president and the general manager or whomsoever may replace them in their duties.

ARTICLE 22. Each time the bank observes a violation of its exclusive function of issuing money, it shall report the act with all its antecedents to the National Executive Power so that the latter may take the necessary action.

ARTICLE 23. The bank may keep a moderate portion of its external assets in deposits or other interest-bearing transactions, in foreign banking institutions or in papers with acknowledged solvency and liquidity payable in gold or foreign currency.

ARTICLE 24. At all times, the bank shall keep a reserve of gold and currencies and other external assets considered as such, including the investments authorized by Article 23, equivalent to a minimum of 25% of its circulating notes and sight obligations.

CHAPTER VII

Relations with Financial Entities

ARTICLE 25. The bank shall coordinate the conducting of the activities of the various official entities—national, provincial or municipal—mixed and private, which, because of their duties, ~~are~~ included in the law of financial entities, by this charter and by its supplements, so that their actions are not inappropriately obstructed within a single region or place.

Furthermore, and without prejudicing the operations falling under its jurisdiction, the bank, as leader of the official banking system, shall each year conduct a general audit of the Banco de la Nación Argentina, the Banco National de Desarrollo, the Banco Hipotecario Nacional and the National Fund of Savings and Insurance, reporting its conclusions to the National Executive Power.

ARTICLE 26. General or special plans of development prepared by banks and other official financial entities of the Nation, as well as any investment in excess of those included in these plans, must have the bank's prior approval.

ARTICLE 27. Banks and other financial entities of provinces or municipalities, mixed or official, as well as national private ones, may participate in the development plans referred to in the preceding article, in which case they shall, for this purpose, enjoy the benefits and privileges that official entities of the Nation are recognized to have.

To bank, whose participation in these plans the entities must solicit, shall so agree insofar as the Nation's financial and economic policy so advise and the reserves that they may have accumulated to cover, for its account, the total or partial losses that said transactions may cause so allow.

ARTICLE 28. The bank shall regulate the creation and operation of the clearing house of checks and other securities.

CHAPTER VIII

Relations with the National Government

ARTICLE 29. The bank may make temporary advances to the national government up to an amount not to exceed 30% of the cash resources [line missing] such nature must be reimbursed within twelve months from taking place. If any advance of this nature is unpaid after this period of time, this power of the bank may not be reused until the quantities owed have been repaid. On these advances, the government shall pay an interest to be agreed upon with the bank, no greater than the minimum rate of discount in effect.

ARTICLE 30. The bank, directly or through the banks, shall undertake to make bank transactions and remittances of the national government both within the country and abroad; it shall receive in deposit the funds of the national government and all the autarchic divisions, and it shall make payments on their behalf. The bank shall not pay any interest on the sums deposited in the government's account nor shall it be remunerated for the payments that it may make on its behalf, but it may charge it for the expenses that it, in turn, may have paid to the banks. The Central Bank may order that the deposits of the government and autarchic entities be transferred to the official and mixed banks. Similarly, it may order the banks to conduct banking transactions of any sort of the government and the State divisions or enterprises.

ARTICLE 31. The bank shall act on behalf of the national government in the placement of public loans of any class and term and in handling foreign and domestic public-debt services.

It may place securities on direct sale in the market or by means of financial consortia. It may promote and supervise the operation of these consortia and integrate them, in which case it shall assume their management. The bank may not take firm subscriptions.

It shall collect a commission for said services, charging same to the Secretariat of State for Finance.

ARTICLE 32. The bank is empowered to arrange, with the paying or fiscal agent, *ad referendum* of the Secretariat of State for Finance, the measures that it deems most suitable for due handling, on behalf of the national government, of foreign public-debt services.

ARTICLE 33. The bank shall charge the Secretariat of State for Finance for the amount of the foreign and domestic public-debt services handled on behalf of the national government, as well as the costs that said services may engender. The national government shall provide the bank with the necessary funds to handle said costs, but the bank may advance them within the limitations established in Article 29.

ARTICLE 34. The bank shall provide the Ministry of Economy of the Nation with the inspection of all instruments concerning the placement of public loans and the handling of public-debt services, including the voiding and destruction of securities, and the inspection of books, registers and other documents related to such transactions.

Furthermore, it shall give it special information concerning the performance of its duties as financial agent of the national government.

ARTICLE 35. The bank must inform the Ministry of Economy of the Nation about the currency-exchange, credit and monetary situation, flow of funds, balance of payments and national income and proceeds, formulating, in each case, the considerations that it may deem proper.

ARTICLE 36. Any sale or purchase of public securities that the official banks may conduct on their own behalf and other national decentralized agencies, national divisions, national social-security funds and enterprises, regardless of their legal system, whose capital belongs in full or in part to the National State, must be done through the bank. Similarly, it shall be consulted as to bids that said divisions and

entities may wish to submit in biddings for amortization of the public debt.

ARTICLE 37. The Ministry of Economy of the Nation shall give the bank the following information corresponding to each quarter:

a) Movement of receipts and disbursements of the General Treasury of the Nation by their various classifications;

b) Itemization of the collection of cash resources and the proceeds of credit resources;

c) Costs incurred, as permitted by the establishment of the respective accounting, and

d) Statement of the foreign and domestic floating and consolidated debt.

In addition to this information, the bank may ask the Ministry of Economy of the Nation and other ministries and public divisions for supplementary information that may be necessary or useful for it to better perform its duties.

CHAPTER IX

System of Currency Exchange

ARTICLE 38. The bank must:

a) Advise the Ministry of the Economy of the Nation in all matters concerning the system of currency exchange and establish its regulations, which shall be mandatory for public entities;

b) Apply the standards of currency exchange and perform the supervisory measures that their compliance requires;

c) Administer the income of currencies issuing from exports and other sources and their allocation to pay for imports and other remittances, and

d) Advise the National Executive Power through the Ministry of Economy of the Nation about rates of exchange and the setting of import and export duties and duties of any other nature that might affect financial and commercial transactions with foreign countries.

ARTICLE 39. The bank may force financial entities, currency-exchange brokers, offices, agencies and firms, exporters, importers or other individuals or legal entities intervening directly or indirectly in currency-exchange transactions to exhibit their books and documents, to provide all information and documentation concerning the transactions that they may have conducted or in which they may have taken part and order the confiscation of same and any other item connected with said transactions. Information so gathered shall be confidential in nature and shall be subject to the provisions of Article 34 of the Law of Financial Entities.[1]

Similarly, it is empowered to draw up indictments and apply sanctions for infractions of the currency-exchange standards and to solicit, at any state of the investigations or of the administrative proceedings, preventive attachments and other precautionary measures for the amounts that it deems sufficient to guaranty the fines and reimbursements that may be due. (Law No. 21.364 - 7/27/76 -)

ARTICLE 40. The bank is responsible for granting and cancelling authorizations to exchange currencies.

CHAPTER X

Accounts and Statements

ARTICLE 41. The bank's financial year shall last one year and shall close on December 31.

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(1) Article 40 of Law No. 21.526

ARTICLE 42. The bank shall publish summarized statements of its assets and liabilities at the close of operations on the 7th, 15th and 23rd and last day of each month.

ARTICLE 43. The bank's observance of the provisions of this organic charter and other laws, decrees, resolutions and provisions that may be applicable to it shall be supervised by an agent appointed by the National Executive Power. The agent, who must be an attorney, doctor of economic sciences or national public accountant, shall hold office for two years and may be reelected; he shall have access to all documents, books and other evidence of the bank's transactions and shall sign the balance sheets and statements of profit and loss at the end of the fiscal year. He shall inform the board of directors of the bank and the National Executive Power, through the Ministry of Economy of the Nation, about the management of the institution's transactions.

For his service, the agent shall receive the remuneration set in the bank's budget.

ARTICLE 44. The provisions of the law of accountancy shall only apply to the bank in regard to verifying that expenditures fit within the authorizations of its administrative budget and in regard to the submission of documented accounts which, periodically and at least once per year, it must submit to the Court of Accounts of the Nation.

CHAPTER XI

Profits

ARTICLE 45. Liquid profits resulting at the close of each fiscal year, after amortizations, write-offs, provisions and allowances, shall be allocated:

a) 50% to the general reserve fund and to the special reserves that the board of directors may determine, and

b) 50% to General Income (Law No. 21.757 of 3/7/81).

CHAPTER XII

Sundry Provisions

ARTICLE 46. The bank may order the immediate assistance of the police force when it encounters obstacles or resistance to carrying out the inspection and verification duties assigned to it.

It may also request the necessary search warrants from the competent courts, which warrants must be issued without delay under the responsibility of the officials requesting them.

ARTICLE 47. The bank is subject exclusively to national jurisdiction. When it is plaintiff in litigation, the national jurisdiction shall be concurrent with the jurisdiction of the provincial courts.

ARTICLE 48. The president of the bank shall answer court interrogatories in writing and is not obliged to appear in person.

ARTICLE 49. The bank's principal office and the offices of its branches shall be exempt from any national, provincial or municipal tax and so shall the transactions that it may conduct directly or through financial entities for the portion of the tax that is not charged to the other parties intervening.

ARTICLE 50. The bank shall be in charge of the compilation, analysis and regular publication of the main monetary, credit and currency-exchange statistics, as well as the annual preparation and publication of the balance of payments and the national accounts. Similarly, the bank shall maintain a department of financial-economic analysis and studies.

ARTICLES 51. The bank's portfolio may contain public securities the amount of which may not exceed thirty-five per cent (35%) of the total deposits received by the banks. (Paragraph amended by Law No. 21.547 - 3/14/77). The calculation of this amount shall not include the "Bond of Bank Guaranty," the "Consolidated Bonds of the National Trea-

sury," the regulation fund provided by Article 18, paragraph i), of this law, nor the other securities that the Central Bank may have on the effective date of this law.

CHAPTER XIII

Temporary Provisions

ARTICLE 52. The bank shall not be subject to Article 6 of Law No. 21.121, nor shall it be subject to the other provisions of a general nature limiting the powers provided in this Organic Charter, except for express provisions contained in future standards of equal constitutional hierarchy. (Law No. 21.364 - 2/27/76 -)

ARTICLE 53. To comply with the provision of Article 5 of this organic charter, the necessary funds will be taken from the general reserve.

ARTICLE 54. The provision of Article 24 shall be kept temporarily in suspension.

ARTICLE 55. Repealed by Law No. 21.547 - 3/14/77 -.

ARTICLE 56. Decree-law No. 13.126/57 and any other provision that may oppose this law are repealed.

ARTICLE 57. This shall be communicated to the Executive Power.

ARTICLE 58. Repealed by Law No. 22.467 - 6/23/81 -.

NOTE: law No. 21.364, Article 2), includes a new article which is numbered 52, and Article 3) amends the numbering of the previous Article 52 *et seq.*, which becomes 53, 54, 55, 56 and 57.

Law No. 21.547 took effect from the date of application of Law No. 21.495 on decentralization of deposits in financial entities.

PROMULGATION OF LAW No. 20.539

Decree No. 1607

Buenos Aires, October 2, 1973

THEREFORE:

Let it be a Law of the Nation, executed, communicated, published, given to the National Office of the Official Register and filed.

Law No. 22.602 - Art. 41.
"Repeal Art. 14, para. b) of Law No. 20.539 and its amendments Laws Nos. 21.364, 21.547 and 21.571; Art. 15, para. c) of the appendix approved by Art. 1 of Law No. 21.799; Art. 19, para. d), Law No. 21.629; Art. 15, para e.), of the appendix approved by Art. 1 of Law No. 22.232 and Art. 15, para. c), of the appendix approved by Art. 1 of Law No. 21.963, corresponding to the agencies that comprise the official banking system."

"The Executive Power shall approve the institutions' budgets of salaries, expenditures and investments, calculation of resources and plan of action for fiscal year 1982, which shall be incorporated annually into the general budget law of the national administration as of 1983."

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S165E/2 is an accurate, true and complete rendition from Spanish into English of BCRA/ANNUAL REPORT 1981 (pp. 1/5, 2/5, 3/5, 4/5) to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4TH DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4948203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

[BCRA Annual Report 1981]

* * * * *

3. FOREIGN EXCHANGE POLICY

During 1981, various foreign exchange meâsures were applied to cope with the problems raised by the foreign sector.

To restrain the private sector's demand for currencies that was observed at the start of the year, caused by increasing expectations of a modification in the foreign exchange policy, in early February, a 10% adjustment in the exchange rate was ordered and the exchange rates that would be in effect daily until the month of August were announced. The rate of devaluation of these foreign exchange standards was 3% monthly.

These measures did not significantly alter the expectations of the private sector, which were manifested in constant buying of currencies backed with Central Bank reserves.

The only formal restriction on purchases of currencies by the private sector—i.e. the limit of $20,000 per person with not need to justify the motive of the transaction—was modified in late March to require the inclusion of a sworn statement making it possible to individualize buyers of currencies.

The economic authorities that took office in late March ordered the abandonment of the previously announced exchange rate policies and established a foreign exchange system in which the Central Bank would, each day, set the effective exchange rates. The application of these measures involved an initial 29% adjustment in the exchange rate with regard to the quoted price of the dollar on the last day of the previous system.

Thus, in the aim of reducing the modification's inflationary impact on foreign exchange parity and increasing the

State's resources, adjustments were ordered in export reimbursements and duties and import duties. The export duties for traditional exports, established at 12%, would gradually be decreased until their elimination in October of 1981 for the light harvest and February of 1982 for the heavy harvest and meat. The percentage of reimbursements to exports was reduced, without affecting the maximum reimbursement of 25% for purely industrial exports. Imports duties were reduced 12 points, except in those cases where they were or became less than 43%. This provision was modified early in May, when all import duties rose 5 points.

The Central Bank's regulation policy stipulated additional exchange-rate adjustments of 3.6% monthly in April and May, which levels were significantly below the rate of increase in domestic prices.

Partly for this reason, in May, the private sector's expectations were again manifested in a steady reduction in reserves at the effective exchange rates set by the monetary authority. To cope with this situation, in early June a new adjustment of 30% was ordered in the exchange rate. Thus, the term for trading currencies of traditional exports was reduced to 30 days and the possibility of early cancellation of obligations by imports was eliminated. To spur the receipt and renewal of loans in the private sector, it was decided to offset the increase in peso liabilities produced by the last devaluation with loans received and/or renewed between 1/1/81 and 5/29/81 maturing on or before 12/31/81, provided that they are renewed with terms of no less than 1 year and a system of foreign exchange insurance was established for loans received or renewed with terms of at least 540 days.

When the private sector's demand for currencies persisted, in late June, the authorities ordered that the foreign exchange market be split into a commercial market and a financial market.

Collections from exports—except for 10% of the collections from promoted exports—and payments from imports were channeled through the commercial market and the

amortization of financial loans renewed with terms of more than year was authorized. Moreover, the exchange rate of this market was used in the transactions with foreign exchange insurance that were conducted. The remaining operations were liquidated through the financial foreign exchange market.

Along with the splitting of the market, early collection or collection against shipping documents for traditional exports and within 180 days for promoted exports was ordered, this obligation of bank backing was reestablished for exports and the payment of imports of current goods was restricted to a minimum term of 180 days.

The foreign exchange rate of the commercial market was set daily by the Central Bank essentially following the changes in domestic prices, while the financial market experienced less intervention by the Central Bank, fundamentally since November, which was reflected in considerable increases in the exchange rate.

Between August and November, the category of operations that could be covered within the foreign exchange insurance system was expanded, permitting the contracting of insurance on capital maturities up until 1983 and interest, even in some cases in which the principal could not be covered with this insurance.

In late November, among the measures geared to reducing the domestic interest rate, to prevent residents from forming assets in foreign currency and to decrease the gap between the prices listed on the commercial and financial markets, a system of swap transactions was established with the Central Bank at 180 days, the operating system of the futures market was expanded and the currency purchases that the private sector was authorized to make in the aggregate of entities without needing to justify the motive for the transaction was reduced to $1,000 per person per day.

The authorities that took office toward the end of the year established significant changes in the foreign exchange policy.

The measures adopted include the reunification of the foreign exchange markets, the elmination of the systems of loans with foreign exchange insurance and of swap operations, the elimination of the restrictions on payment of imports of current goods and the increase, to 20,000 per person per day, of the currency purchases that the private sector may freely make in the aggregate of entities.

For fiscal reasons, a general export duty of 10% applicable to all products that do not receive reimbursement and the reduction of maximum reimbursements to 10% was established. Morever, the minimum import duty was increased from 5% to 10% and the maximum was reduced from 48% to 43%.

* * * * *

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S03090-140E is an accurate, true and complete rendition from Spanish into English of Communication "A" 31 of 6/5/81 and Communication "A" 251 of 11/17/82 to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ MIKAEL E. POULSEN
By Mikael E. Poulsen
Director

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 14TH DAY OF MARCH 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

COMMUNICATION "A" 251 11/17/82

TO FINANCIAL ENTITIES AUTHORIZED TO TRADE IN FOREIGN EXCHANGE AND FOREIGN-EXCHANGE BROKERS:

Ref.: Circular EXCHANGE OPERATIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY— CAMEX-1-44

We are contacting you and, through you, the interested sectors, to inform you that, due to the difficulties existing in the foreign sector and faced with the needs of the monetary program, the economic authorities have provided for the servicing of foreign-exchange insurance contracts concluded by virtue of Communication "A" 31, of 6/5/81; "A" 54, of 8/14/81; "A" 61, of 9/24/81 and "A"76, of 11/30/81, pursuant to the following standards:

1. *Conversion of Private Foreign Debt into Public Debt.*

1.1. The Central Bank of the Argentine Republic, on behalf of the National Government, after payment in pesos of the corresponding amount and after compliance with the formality of point 5, shall service the obligations arising from the foreign-exchange insurance referred to in this circular, whose holders have not submitted any application for extension as of 10/22/82, pursuant to the following terms:

a) Transactions that mature between November 25, 1982 and March 31, 1983 shall be paid as follows:

1st amortization of 25% on 5/25/86
2nd amortization of 25% on 11/25/86
3rd amortization of 25% on 5/25/87
4th amortization of 25% on 11/25/87

b) Transactions that mature as of April 1, 1983 shall be paid as follows:

1st amortization of 25% on 10/1/86
2nd amortization of 25% on 4/1/87
3rd amortization of 25% on 10/1/87
4th amortization of 25% on 4/1/88

1.2. The instrumentation of the transactions shall be optional for the foreign creditor and may be done in any of the following forms:

a) Obligations ("Promissory Notes") of the National Government issued in U.S. dollars, to the name of the creditor, for the corresponding amounts.

b) Registered Bonds of the National Government, issued in U.S. dollars in increments of US$5,000 and larger denominations.

c) Since it is not the purpose of these measures to interfere in the loan contract between debtor and creditor, if they prefer to maintain their relationship directly and instrument it in any form other than the two forms indicated above, the Central Bank is willing to examine such proposals and conditions, provided that they respect the terms of maturity indicated in section 1.1.

The other main issuance conditions and characteristics of the promissory notes and the bonds shall be set forth in point 4, section 4.1 and 4.2.

1.3. The foreign creditor's acceptance of the securities indicated in section 1.2., paragraphs a) and b), shall be equivalent to his acceptance regarding the substitution of the debtor and consequently the cancellation and receipt for the entire original debt.

2. *Extensions of Insurance Requested on or Before 10/22/82*

Holders of insurance contracted by virtue of the standards referred to in this circular who have extended or may extend the maturities of the obligations by taking new foreign-exchange insurance pursuant to the provisions of Communication "A" 137 of 7/5/82, by means of submitting the corresponding application to this Bank on or before 10/22/82, shall have the following treatment:

Those that formalize or have formalized such transactions, when effecting the compensation in pesos between the exchange rate of the insurance that is expiring and the exchange rate of the new insurance, must apply the amount in the following order:

a) Cancellation of credits allocated to the "Consolidated Loan" of the Central Bank, excluding those allocated to sublimits at a free interest rate;

b) Cancellation of credits allocated to the "Consolidated Loan" of the Central Bank, sublimits at a free interest rate;

c) Subscription of the "Monetary Absorption Bond," whose characteristics are set forth in point 4, section 4.3.

3. *Interest*

Interest covered by foreign-exchange insurance may be transferred at the insured exchange rate. Interest not covered by foreign-exchange insurance may be paid by the single exchange market, at the rate in effect at the time of the payment, pursuant to general standards.

4. *Main Characteristics of Payment Instruments*

4.1. *Obligations ("Promissory Notes") in U.S. Dollars*:

Registered, transferrable only abroad by assignment between banks. Variable interest rate to be set and paid every six months. Amortization and interest service shall

be handled by paying agents abroad, who must be notified of any change in ownership.

4.2. *Bonds in U.S. Dollars*:

Registered, variable interest rate to be set and paid every six months. Amortization and interest service shall be handled by paying agents abroad, who must be notified of any change in ownership.

4.3. *Monetary Absorption Bond*:

Issued in pesos and its principal shall be adjustable. Not transferrable. Interest service to be paid every six months.

5. *Additional Requirements*

In the cases indicated in point 1, section 1.2., debtors must submit a sworn statement—on form N 3886 provided by the Central Bank—regarding the origin and characteristics of the transaction and also authorize this Institution to verify the information with the foreign creditors and competent fiscal bodies within our own country.

Sincerely,

CENTRAL BANK OF THE ARGENTINE REPUBLIC

[signature]	[signature]
Horacio A. Alonso	Evaristo H. Evangelista
Asst. General Manager	Asst. General Manager

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss. :
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S11179-029E is an accurate, true and complete rendition from Spanish into English of COMMUNICATION "A" 272 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4TH DAY OF APRIL 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

BANCO CENTRAL DE LA REPUBLICA ARGENTINA

COMMUNICATION "A" 272 1/11/83

TO FINANCIAL ENTITIES AUTHORIZED TO TRADE IN FOREIGN CURRENCIES AND CURRENCY BROKERS:

Re: Circular CURRENCY EXCHANGE TRANSACTIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY—CAMEX-1-45

We are addressing you and, through you, the sectors involved, to inform you that, by virtue of the provisions of Decree No. 1603 of the National Executive Power of 12/21/82, the text of which is appended hereto, the following provisions have been adopted in addition to those set forth in Communication "A" 251 of 11/17/82, pertaining to Chapter 1, point 1.2, section c) thereof.

1. *Transaction Procedures*

1.1. In those instances in which lenders and borrowers decide to maintain their relationship directly, they may grant the renewal of the obligation under the conditions freely agreed upon, provided that the maturity dates indicated in Chapter 1, point 1.1., sections a) and b) of the aforementioned circular are respected.

To formalize this agreement and so that the debtor may grant a guaranty for the performance of the extended obligation, at the request of the local borrower, the Banco Central de la Republica Argentina shall issue, in the name of the creditor, the Registered Bonds of the National Government or the obligations ("Promissory Notes") referred to in Decrees

Nos. 1334 and 1336, respectively.

To this end, when the local debtor pays his foreign exchange insurance through the intervening authorized financial entity—for which he must pay the corresponding peso amount—he shall ask to have the bonds or obligations issued in the name of the creditor and the foreign exchange insurance is extinguished at that time. When form 3891 is submitted, it must be accompanied by form 3189 or 3191 for cancellation thereof, since the debtor loses all right to acquire foreign currency in the single foreign exchange market to make payments for capital inherent in the cancelled insurance. The securities shall be issued in the Treasury Department of this Bank to the person designated by the creditor.

In the case of Bonds, portions less than $ 5,000 shall be paid in foreign currency with allocation to the foreign exchange insurance.

1.2. If the agreement to extend the obligation stipulates the payment of interest rates greater than those set for the obligations or bonds, the local debtor may acquire, in the foreign exchange market, pursuant to the general provisions in effect when the remittances abroad are made, the necessary amounts to cover the interest difference, but in no case may this be done prior to the dates for payment of the interest corresponding to the bonds or obligations.

1.3. The stipulated provisions shall apply only in the following cases:

a) When the creditor is a foreign institution and the debtor's payment obligation is directly with the foreign creditor and payable abroad, or

b) When the creditor is a bank established in the country and the funds lent to the debtor came from lines of credit granted by foreign institutions to the local entity, or

c) When the creditor is a local financial entity and the funds lent came from locally established foreign currency deposits. In this case, the creditor may agree upon procedures with the Banco Central to receive payments of principal and interest abroad.

1.4. Proposals to this Bank must be submitted on form 3892.

2. *Characteristics of the Securities*

2.1. The holder of the Registered Bond or the obligation has the right to collect the payments of principal and interest directly from the paying agent, regardless of the character in which they may have been issued to him.

Each amortization payment shall be considered a partial execution of the guaranty formalized by said bonds and obligations and shall involve the partial cancellation, up to the amount collected by the creditor, of the private foreign debt thus guaranteed.

2.2. The creditor to whom the bonds and obligations are issued in guaranty is authorized to substitute for the original debtor and to maintain the guaranty formalized in said bonds and obligations covering the new undertaking.

2.3. If the creditor to whom the bonds and obligations are issued in guaranty assigns the credit thus guaranteed, the assignee shall retain the guaranty formalized in said bonds and obligations. In such case, the assigning creditor must convey to the assignee the document formalizing the assigned debt as a condition for being able to convey, also, the bond or the obligation that guaranty said debt.

Furthermore and as a condition for such assignment to be considered opposable to the Banco Central de la Republica Argentina, the assigning foreign creditor must officially notify the Banco Central de la

Republica Argentina and the local private debtor (the assignee).

In such case, the Banco Central de la Republica Argentina, in its capacity as Financial Agent of the National Government, shall mandate the paying agent to amend the bond or obligation, substituting the name of the creditor.

Very Sincerely,

BANCO CENTRAL DE LA REPUBLICA ARGENTINA

[signature]

Jorge E. Magistrelli
Manager, Foreign and
Currency Exchange

[signature]

Horacio A. Alonso
Assistant General Manager

THE NATIONAL
EXECUTIVE POWER

Buenos Aires, December 21, 1982

IN VIEW OF the provisions of Decrees Nos. 1334 of November 26, 1982, 1336 of November 26, 1982 and Communication "A" 251 of November 17, 1982, from the Banco Central de la Republica Argentina, and

WHEREAS:

Communication "A" 251 expressly provides for the direct agreement between the local debtor and the foreign creditor, as the purpose of said standard was not to interfere in the mutuum contract between the parties.

Direct agreements would be substantially facilitated if the Banco Central de la Republic Argentina issued, in guaranty of the debtor's obligation, the Registered Bonds in United States dollars or the domestic public debt Securities described respectively in Decrees Nos. 1334 and 1336, both dated November 26, 1982, or guaranteed the local debtor's obligation in some other form.

In certain cases, the creditor of the obligations of the debtors described in articles 2 of Decrees Nos. 1334 and 1336 of November 26, 1982 are local financial entities; thus, it is proper to stipulate that such creditors may also be recipients of the Bonds or Securities, whether it be in payment or in guaranty.

Therefore,

THE PRESIDENT OF THE ARGENTINE NATION

DECREES:

ARTICLE 1—The registered bonds in United States dollars and the public debt securities considered, respectively, in

Decrees Nos. 1334 and 1336, both dated November 26, 1982, in addition to being intended to cancel the foreign obligations described in article 2 of both decrees, may also be issued by the Banco Central de la Republic Argentina to creditors in guaranty of performance of the debtor's obligations refinanced by the parties to the mutuum contract.

ARTICLE 2—The Banco Central de la Republic Argentina may agree and resolve upon the form and circumstance in which the public debt Bonds or Securities—Decrees Nos. 1334 and 1336 of November 26, 1982, respectively—are issued in guaranty. Insofar as its own capital is not affected and it acts as Financial Agent for and on behalf of the National Government, the Banco Central de la Republic Argentina may also provide for other mechanisms to guaranty the performance of the obligations of the debtors who have paid in pesos the amount corresponding to the foreign exchange insurance.

ARTICLE 3—The Banco Central de la Republic Argentina is authorized to issue to local financial entities who are creditors of the obligations described in articles 2 of Decrees Nos. 1334 and 1336 of November 26, 1982, the Bonds or Securities of the public debt considered therein. As appropriate, such issuance shall be done in cancellation or in guaranty of the performance of the aforementioned obligations. In such cases, the local financial entity may not give, assign or endorse the bonds or securities inside the country; in exchange, it is authorized to give them in payment, assignment or guaranty to its creditors abroad.

ARTICLE 4—The peso amounts that the Banco Central de la Republic Argentina obtains from those parties indebted to foreign creditors, which parties have contracted foreign exchange insurance with this Institution, by the payment thereof, shall be allocated to diminish the obligations of the NATIONAL GOVERNMENT vis-a-vis the Banco Central de la Republica Argentina.

ARTICLE 5—Be it communicated, published, given to the national Office of the Official Registry and filed.

DECREE No. 1603

BIGNONE

Signed: Dr. Jorge Wehbe
Ministry of Economy

A COPY

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S165E2 is an accurate, true and complete rendition from Spanish into English of COMMUNICATION "A" 278 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 5TH DAY OF APRIL 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

CENTRAL BANK OF THE ARGENTINE REPUBLIC

COMMUNICATION "A" 278 1/26/83

TO FINANCIAL ENTITIES AND FOREIGN-EXCHANGE BROKERS:

Ref.: Circular NATIONAL PUBLIC SECURITIES—TINAC-1-10. Circular EXCHANGE OPERATIONS AND MOVEMENT OF FUNDS AND SECURITIES INTO AND OUT OF THE COUNTRY—CAMEX-1-47

We are contacting you and, through you, the interested parties, to inform you that, pursuant to the provisions of Decrees of the National Executive Power Nos. 1334/82, 1335/82 and 1336/82—publicized by Communication "B" 503 of 12/2/82—this Bank has resolved to implement the issuance of the securities whose terms and conditions are specified below:

1. *"MONETARY ABSORPTION BONDS—1st Series"*

1.1. Characteristics of the Securities:

1.1.1. Date of issuance: November 26, 1982.

1.1.2. Term: 5 years.

1.1.3. Issuance amount: This will be the amount resulting from the face value peso investments made by the investors referred to in article 2 of Decree No. 1335/82, between 11/26/82 and 2/28/83.

1.1.4. Interest rate: The annual interest rate will be 8%, payable semi-annually at end of term, on 5/26 and 11/26 of each year; the first

payment will be due on May 26, 1983.

The interest rate will be applied to the principal adjusted pursuant to the provisions of point 1.1.7.

1.1.5. Price of placement: The price corresponding to the adjusted principal plus interest to the adjusted principal plus interest accrued on the date of expiration of the foreign exchange insurance.

1.1.6. Repayment: This shall be done on the face value of each investment in seven semi-annual installments, the first six for 14% and the last one for 16%. The first payment shall take place on November 26, 1984.

1.1.7. Adjustment clause: The repayment services shall be paid on each maturity, adjusting the face value pursuant to the variation in the closing exchange rate of the Banco de la Nacion Argentina, for income from loans from abroad in United States dollars, between the 7th day prior to the issuance date and the 7th day prior to the date of each maturity. If this last day is an exchange holiday, the first work day immediately prior shall be used.

1.1.8. Register of investments: The Central Bank of the Argentine Republic will record the investments each day in the face value of the Bond, in the name of each financial entity intervening in the transaction.

Financial entities shall proceed to register, in accounts that they shall provide for this purpose, the amount of the face value of the investments that correspond to each investor, with no delivery of securities.

Financial entities shall certify in writing to each investor the face value amount invested.

1.1.9. Handling of financial services: These shall be handled by the Central Bank of the Argentine Republic on the due date of each service, by means of credits in the current accounts that the financial entities maintain at this Institution.

Financial entities shall proceed, on the same date, to pay the financial services to the investors.

1.1.10. Early redemption: The Office of the Secretary of the Treasury may order the early redemption of all or part of the securities issued, at their adjusted value plus interest accrued.

1.1.11. Tax exemptions: Both the principal and the income of the present issue are exempt from any tax assessment.

1.2. Procedure for compliance with cancellations of credits applied by the entities that are creditors to "Consolidated Loan" of the Central Bank and amount to be invested in the "Monetary Absorption Bond-1st Series":

1.2.1. The peso amount that corresponds to the exchange rate compensation as a result of the extension of the maturity of foreign debts, defined pursuant to the provisions of sections a) and b) of article 2 of Decree No. 1335/82, shall be credited, on the transactions's maturity date, by the Central Bank into an account opened for this purpose, in which shall be recorded the amounts corresponding to the foreign exchange insurance contracts by each entity in which the transaction was contracted.

These funds shall not comprise their availabilities.

The Central Bank shall report the amount of the credit to the entity, which, by the end of the following work day, shall so inform the foreign exchange insurance policyholder.

1.2.2. The policyholder shall ask the financial entities with which it has debts to certify the balances that it owes as principal and pursuant to each one of them on the date indicated in point 1.2.1. and that the entity has allocated to "Consolidated Loan" of the Central Bank.

For this purpose, it shall submit a Form No. 3889 (Annex V hereof) to each financial entity in which it has debts, which must be issued within 5 work days following the corresponding receipt.

1.2.3. The policyholder shall complete the Sworn Statement-Form No. 3890 (Annex VI) specifying the financial entities and amounts for which, up to the amount resulting from the exchange rate compensation, it requests cancellation of its debt. This form shall be submitted to the entity with which it contracted the foreign exchange insurance, enclosing all copies of Form No. 3889.

The aforementioned entity shall forward Form No. 3890 and annexes thereof (Forms Nos. 3889) to the Central Bank—Department of the General Secretary—on the first work day following reception thereof.

1.2.4. On the date indicated in the preceding section and after debiting the account mentioned in 1.2.1., the Central Bank shall proceed to:

1.2.4.1. credit the current accounts of the financial entities for the amounts of the debts that the policyholder is cancelling, and

1.2.4.2. apply the remaining balance, if any, to the subscription of the "Monetary Absorption Bond."

1.2.5. When the expiration of the foreign exchange insurance contract coincides with the date on which the policyholder is to receive the benefit of the system referred to in CAMEX Circular 1-3 (Communication "A" 33), these resources shall be allocated for cancellation of debts applied to the "Consolidated Loan" by subsequently applying the procedure specified in the preceding points.

1.3. Compensation to financial entities that participate in the placement and handling of financial services:

Financial entities authorized to trade in foreign exchange shall receive a commission of 0.5% for their participation in the placement and a commission of 0.1% for the handling of the financial services in both cases on the corresponding actual value.

2. *REGISTERED BONDS IN UNITED STATES DOLLARS—1st Series* (pursuant to the model of the Representative Security included as Annex I)

2.1. Characteristics of the securities offered:

2.1.1. Date of Issuance: November 26, 1982.

2.1.2. Term: 5 years.

2.1.3. Face value issued: US$2,000 million, in sheets of US$5,000; US$10,000; US$25,000; US$50,000 and US$100,000.

2.1.4. Interest rate: Variable, payable in United States dollars semi-annually at end of term, on 5/26 and 11/26 of each year, with the first payment due on 5/26/83. This rate, like the annual rate in effect for 180 day term eurodollar deposits in the London interbank market, shall be established by the Central Bank of the Argentine Republic on the basis of the arithmetic average of the rates quoted by its London correspondent banks at the close of business on the work day immediately preceding the start of each income period.

An additional rate of TWO (2) percent shall be added to this annual rate.

2.1.5. Repayment: Each security shall be repaid in four equal semi-annual installments of 25% each. The first instalment shall be due on May 26, 1986.

2.1.6. Title: The "Registered Bonds in United States Dollars—1st Series" shall be issued to the order of the creditors whose credits are being cancelled, as provided in article 2 of Decree No. 1334/82.

2.1.7. Negotiability: With the exception of the primary placement done by this Bank, the securities may not be the subject of a public offering within the territory of the Argentine Republic nor any transaction involving persons residing or domiciled in the country. Consequently, they may only be traded abroad and, in such case, each transfer must be reported by the transferring party, identifying the name and address of the new holder, and the number of each sheet transferred. The transfers must be reported by telex to the Central Bank of the Argentine

Republic at least 30 days prior to the maturity of each interest period. Under no circumstances may the Bonds be transferred to persons residing or domiciled in the Argentine Republic.

Transfers that are not reported pursuant to the form and terms provided in this point shall be considered null and void with respect to the issuer.

2.1.8. Payment of financial services: These shall be paid by the Central Bank of the Argentine Republic in United States dollars by transfer on the markets of New York, Frankfurt, London or Zurich for credit to the accounts that the holders indicate within the deadline provided in point 4.2. hereof or, if applicable, for credit to the account indicated by the subsequent beneficiaries by telex addressed to this Central Bank identifying the number and face value of the sheets assigned, which must be received at least 30 days prior to the maturity of each interest period.

The coupons corresponding to each service must be presented at least 30 days in advance to the foreign financial entities which this Central Bank shall inform in due time.

2.1.9. Early redemption: The Office of the Secretary of the Treasury may order the early redemption of all or part of the securities issued, for the value of the principal owed plus interest accrued.

2.1.10. Tax exemptions: The financial services of the "Registered Bonds in United States Dollars" shall be paid with no deduction whatsoever for assessments, taxes or rates,

present or future, effective in the Argentine Republic.

2.1.11. Placement and price: Pursuant to the procedure referred to in point 4., at a price equal to its nominal principal plus interest accrued as on the day of expiration of the foreign exchange insurance contract.

2.1.12. Certificates: While the sheets are being printed, non-transferrable and registered certificates shall be issued, stating the subscribed face value and the undertaking of the Central Bank to replace them with the bonds.

3. *OBLIGATIONS IN UNITED STATES DOLLARS OF THE NATIONAL GOVERNMENT (Decree No. 1336/82)*

3.1. Characteristics of the obligations issued between 11/26/82 and 3/31/83:

3.1.1. Basic text: Per model incorporated as Annex II.

3.1.2. Repayment: This shall be done in four semi-annual installments of 25% each, the first one falling due forty-two months after the date of issuance of each obligation.

3.1.3. Income: This shall be paid semi-annually at end of term, the first payment falling due six months after issuance of the obligation. The interest rate to be accrued shall equal the annual rate in effect for 180 day term euro-dollar deposits in the London interbank market. The Central Bank of the Argentine Republic shall establish it on the basis of the arithmetic average of the rates quoted by its London correspondent banks at the close of business on the work day immediately preceding the start

of each income period. An additional rate of TWO (2) percent shall be added to this annual rate.

3.1.4. Title: They shall be issued to the order of the creditors whose credits are being cancelled, as provided in article 2 of Decree No. 1336/82.

3.1.5. Negotiability: The securities may not be the subject of a public offering within the territory of the Argentine Republic nor transactions involving persons residing or domiciled in the country.

They may only be transferred to financial entities domiciled abroad and, in such case, the transaction must be reported by the transferring party, identifying the name and address of the beneficiary. These transfers must be reported by telex to the Central Bank of the Argentine Republic at least 30 days prior to the maturity of each interest period.

Under no circumstances may the Bonds be transferred to persons residing or domiciled in the Argentine Republic. Transfers that are not reported pursuant to the form and terms provided in this point shall be considered null and void with respect to the issuer.

3.1.6. Payment of financial services: These shall be paid by the Central Bank of the Argentine Republic in United States dollars by transfer, for credit to the accounts that the holder specifies on the memorandum whose model is attached as Annex II or, if applicable, for credit to the account indicated by the subsequent beneficiaries by telex addressed to this Central Bank, which must be received at least 30 days prior to the maturity of each interest period.

3.1.7. Tax exemptions: The services shall be paid without any deduction for assessments, taxes or rates, present or future, effective in the Argentine Republic.

3.1.8. Placement and Price: Pursuant to the procedure referred to in point 4., at a price equal to its par value.

4. *OPERATING PROCEDURES AND REQUIREMENTS IN CONNECTION WITH THE PLACEMENT OF THE "REGISTERED BONDS IN UNITED STATES DOLLARS" AND THE OBLIGATIONS IN DOLLARS OF THE NATIONAL GOVERNMENT (Decree No. 1336/82) DESCRIBED IN POINTS 2. AND 3.*

4.1. The delivery of the securities to the creditor shall be subject to the creditor's certifying and stating to this Institution that:

4.1.1. The credit that it maintains with the foreign exchange insurance policyholder corresponds, in amount and terms, to what the debtor has stated. (Memorandum sent by the debtor to the Central Bank shall be attached; per model attached as Annex IV).

4.1.2. Against delivery of the securities by the Central Bank of the Argentine Republic, it shall extinguish its loan to the foreign exchange insurance policyholder.

4.1.3. It acknowledges the right of the Central Bank of the Argentine Republic to request information about the loan granted to the foreign exchange insurance policyholder and shall assist in providing it.

4.2. The requirements set forth under point 4.1. shall be met, through a letter addressed to this Institution, using as a model the letter enclosed in Annex III,

selecting the securities described in points 2. or 3. hereof, designating the person authorized to withdraw them from this Institution and it shall specify the account into which the financial services are to be credited.

4.3. The policyholder must submit to the intervening financial entity the memorandum indicated in point 4.2., along with Form No. 3891 (Annex VII) which shall be delivered by the intervening bank to this Central Bank—Department of Foreign Exchange Operations, 3rd floor, office 304—until 3:00 p.m. of each day.

5. The purpose of the above provisions is compliance with the transactions provided in Communication "A" 251 (CAMEX-1-44) of November 17, 1982, except for the transactions considered in paragraph c) of section 1.2. thereof, for which the provisions of the Decree of the National Executive Power No. 1603 of 12/12/82 and regulatory standards thereof, publicized through Communication "A" 272 (CAMEX-1-45), shall apply.

In this regard, proposals under the provisions of the aforementioned paragraph c) must be submitted on Form No. 3892 (Annex VIII), to the Department of the General Secretary of this Bank, in the usual form, at least ten work days prior to the contract's expiration date.

Sincerely,

CENTRAL BANK OF THE ARGENTINE REPUBLIC

[signature]

Simon L. Guerberoff
Asst. Manager of
Public Finances

[signature]

Pedro Camilo Lopez
General Manager

ENCLOSURES

B.C.R.A.	MODELO DE TITULO REPRESENTATIVO DE LOS "BONOS NOMINATIVOS EN DOLARES ESTADOUNIDENSES"	Anexo I a la Com. "A" 278

[Text of Bonod]

B.C.R.A.	TEXTO BASICO DEL "PROMMISORY NOTE" (obligaciones en dólares estadounidenses del Gobierno Nacional)	Anexo II a la Com. "A" 278

US$ . . . . . US$ . . . . . .

(Date)

The Republic of Argentina ("PAYOR), acting through the Banco Central de la Republica Argentina ("BCRA") as its financial agent in accordance with Decrees N° 1336/82 and 1603/82 of the National Executive Power, promises to pay in (settlement of guarantee) of the debt of (debtor's name) to (creditor's name) ("PAYEE"), regardless of the capacity in which this promissory note has been delivered to him, the principal amount of

United States Dollars in four equal installments of United States dollars . . . . . each on . . . . . , and . . . . . , together with interest on the upaid balance hereof from time to time outstanding at a rate per annum equal to . . . . . percent over the LIBO rate (as hereinafter defined) from time to time in effect, which interest shall be payable semi-annually in arrears on . . . . . and . . . . . (each an "interest payment date") of each year and upon payment of this note in full. LIBO rate shall mean, for each semi-annual period commencing on an interest payment date during which any principal of this note is outstanding, the arithmetic

Spanish Text

mean of the respective rates quoted by the correspondents of BCRA in London as the rate at which deposits in United States dollars for periods of six months are offered to them by prime banks in the Eurodollar Interbank Market at the close of the London Banking day which is one London Banking day prior to such interest payment date. No later than each interest payment date, BCRA shall determine and advise Payee of the interest rate to be in effect for the period commencing on such interest payment date.

Spanish Text

All payments hereunder shall be made in lawful money of the United States of America by transfer for credit to the account of ..... N° ..... or for the account its transferee or assignee shall have designated in writing to BCRA for such purpose at least thirty days prior to the date on which any payment is due hereunder.

All payments to be made hereunder shall be made without deduction for or on account of any present or future taxes now or hereafter imposed by, or within the territory of, Payor or any political subdivision thereof.

B.C.R.A.	TEXTO BASICO DEL "PROMMISORY NOTE" (obligaciones en dólares estadounidenses del Gobierno Nacional)	Anexo II a la Com. "A" 278

The terms of this note may not be changed, waived, discharged, or terminated except by an instrument in writing signed by the party against which enforcement of such change, waiver, discharge or termination is sought and shall inure to the benefit of and be enforceable by Payee, its successors and assigns, provided, however, that no transfer or assignment of this note shall be made by Payee (A) to any person other than a financial institution not domiciled in the Argentine Republic and (B) without giving written notice to BCRA of the name and domicile of the transferee or assignee, and provided further that any transfer in contravention of the foregoing shall be void and of no effect as against Payor and neither Payor nor any agent or instrumentality thereof shall be required to recognize or afford the same.

Spanish Text

Payor agrees and the holder of this note by its acceptance hereof agrees for itself and its successors and assigns, that any suit, action or proceeding arising out of or relating to this note must be instituted ...., to waive any objection which they may now or hereafter have to the laying

of the venue of any such suit, action or proceeding and irrevocably to submit to the jurisdiction of any such court in any such suit, action or proceeding.

In witness whereof, Payor has executed this note on the dated written above.

Spanish Text

BANCO CENTRAL DE LA
REPUBLICA ARGENTINA
AS FINANCIAL AGENT FOR LA
REPUBLICA ARGENTINA

BY:

B.C.R.A.	NOTA DEL ACREEDOR AL "B.C.R.A"	Anexo III a la Com. "A" 278

(Date)

RE: US$ ... LOAN AGREEMENT
DATED ..... WITH
..... AS BORROWER
AND ..... AS LENDER
(the "loan agreement")

TO
BANCO CENTRAL DE LA
REPUBLICA ARGENTINA:

We herewith confirm the information set forth in the letter dated , 198 from the borrower to Banco Central de la Republica Argentina ("BCRA"), a copy of which is attached.

Spanish Text

We further confirm and agree that (in lieu of the obligation of Borrower under the loan agreement or as guarantee for Borrower's obligations under the loan agreement) we shall accept: (1. or 2. or any mixture thereof)

1. Performance by la Republica Argentina in accordance with the terms of the promissory note attached hereto (the "promissory note") and to be

executed by BCRA as financial agent of la Republica Argentina.

2. REGISTERED BONDS DENOMINATED IN UNITED STATES DOLLARS issued in accordance with decrees Nos. 1334/82 and 1603/82 of the National Executive Power and Resolution No. 46/83 of BCRA.

All payments in respect of the (promissory note and/or the bonds) shall be made for credit to our account No. .

This accord and satisfaction shall be effective upon our receipt of the above mentioned (promissory note and/or bonds).

Spanish Text

Upon such receipt, we agree that all obligations of the borrower in respect of the loan agreement shall have been duly (discharged and satisfied or guaranteed).

We further recognize the authority of BCRA to inquire into information concerning the loan agreement and we agree to cooperate with BCRA in such endeavor.

Hereby we authorize ..... to receive in our behalf the (promissory note and/or the bonds).

B.C.R.A.	NOTA DEL ACREEDOR AL "B.C.R.A"	Anexo III a la Com. "A" 278

The foregoing is premised and conditioned upon the receipt of the (promissory note and/or the bonds) duly executed not later than 10 business days from the date hereof.

Spanish Text

Name of the creditor:

By:
Title

B.C.R.A.	NOTA DEL DEUDOR AL "B.C.R.A"	Anexo IV a la Com. "A" 278

TO
BANCO CENTRAL DE LA
REPUBLICA ARGENTINA

RE: US$...LOAN ARGREEMENT
DATED .....WITH
.....
AS LENDER (the "loan agreement")

With regard to the above-captioned loan agreement, we hereby represent and warrant to you as follows:

Spanish Text

1. As of the date hereof, our total obligation under the loan agreement is US$, of which US$ represent the unpaid principal balance and US$ represent accrued and unpaid interest thereon.

2. The applicable interest rate is (rate or formula).

3. The maturity date(s) of obligations under the loan agreement is

4. The name, address and telex number of the lender under the loan agreement are as follows:

B.C.R.A.	NOTA DEL DEUDOR AL "B.C.R.A"	Anexo IV a la Com. "A" 278

5. We hereby authorize you to contact the (name of creditor) or any other bank participating in this credit in order to verify the above terms of the loan agreement and any other terms thereof or related thereto which you may deem relevant. We acknowledge that any such inquiry on your part will not constitute an invasion of our privacy or infringe any other rights we may possess, and we intend hereby to waive any right we may have under Argentine law, the federal law of the United States of America or the law of any state or local subdivision thereof. (If any credits are from non-United States Banks the names of those countries should be inserted instead).

Spanish Text

Debtor:
By:
Title

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. 728 (pages 10-12) is an accurate, true and complete rendition from Spanish into English of Decree 772 pertaining to Banco Central de la Republica Argentina to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4TH DAY OF APRIL 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

DECREES

Public Debt

The Ministry of Economy is empowered temporarily to extend amortizations of principal corresponding to Registered Bonds in United States dollars (Bonods) and Foreign Public Debt Securities (Promissory Notes).

DECREE
No. 772
Buenos Aires, 5/23/86

IN VIEW OF the need to implement the refinancing policy applicable to foreign indebtedness, and

WHEREAS:

In 1982, as the situation of foreign payments became critical due to the lack of sufficient currency reserves to face all foreign obligations, the Government of the Argentine Republic initiated, as part of its international monetary policy, a Public-Sector refinancing program which included, among other obligations, those obligations related to the expiration of the exchange insurance contracts in existance at that time between certain Argentine debtors and the Central Bank of the Argentine Republic.

Whereas said program was part of another, larger program which includes other governments and international organizations.

Whereas, as of May 26, 1986, the instalments of principal of—"Bonods" and "Promissory Notes"—debt securities issued to facilitate the refinancing of the obligations related to the expirations of said exchange insurance contracts, pursuant to Communication "A" 251 of the Central Bank of the Argentine Republic dated November 17, 1982 and the standards of Decrees of the National Executive Power No. 1334 and No. 1336, both dated November 16, 1983, and No. 1603 of December 21, 1982, began to fall due.

Whereas the country continues to have insufficient currency reserves to handle all the maturities of principal and interest of the Public Sector, including those corresponding to "Bonods" and "Promissory Notes" and therefore is has become necessary to continue implementing an ordered system of allocating scarce currencies giving equal and impartial treatment to all creditors within the general framework of negotiations of the foreign debt.

Whereas the negotiations of the foreign debt aiming to establish the situation relative to foreign payments include the refinancing of the maturities of principal and obtainment of additional financing, and constitute a full and complete exercise comprising the continued participation of multilateral finance and development organizations such as the International Monetary Fund and the World Bank, other governmental entities of credit and credit insurance for foreign export, commercial banks and other creditors.

Whereas, in accordance with the legal duties and responsibilities of the National Executive Power, it is necessary to establish alternative mechanisms to handle maturities of principal of "Bonods" and "Promissory Notes" for the purpose of presenting the holders with a new payment program.

Whereas this decision is an essential element for the Government of the Argentine Republic to comply with the policy of development and to face the lack of sufficient currency reserves, and is adopted exclusively for the purpose of implementing the Government's monetary policy to confront the continued foreign-payments crisis besetting the country.

Wheras, pursuant to the provisions of article 4 of Law No. 20.639, it is the duty of the Ministry of Economy to give general directives to the Central Bank of the Argentine Republic in matters of economic, monetary and financial policy.

Whereas, in accordance with the provisions of article 86, paragraph 1 of the National Constitution, the National Executive Power is empowered to approve transactions such as those considered by this Decree.

Therefore,

THE PRESIDENT
OF THE ARGENTINE NATION
DECREES

Art. 1—The Ministry of Economy is empowered temporarily to extend for one hundred eighty (180) days, reckoning from the respective maturity dates, the amortizations of principal produced as of May 26, 1936, corresponding to the Registered Bonds in United States dollars ("Bonods") and Foreign Public Debt Securities ("Promissory Notes") issued pursuant to Decrees No. 1334 and 1336, both dated November 16, 1982, and No. 1603 dated December 21, 1982, and Communication "A" 251 of the Central Bank of the Argentine Republic dated November 17, 1982.

Art. 2—The Ministry of Economy is empowered to establish the characteristics, terms and other conditions that the extension indicated in article 1 hereof shall have.

Art. 3—The Ministry of Economy is empowered to establish a definitive system to handle the obligations indicated in article 1 of this Decree.

Art. 4—The Ministry of Economy, using the powers vested in it by article 4 of Law No. 20.539, shall instruct the Central Bank of Argentina so that, in its capacity as financial agent of the State, it may dictate the standards and establish the procedures necessary for compliance with this Decree.

Art. 5—Communicate, publish, give to the National Office of the Public Registry and file.

ALFONSIN
Juan V. Sourrouille
Mario S. Brodersohn

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. _____ is an accurate, true and complete rendition from Spanish into English of a RESOLUTION dated May 23, 1986 in Buenos Aires to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 4TH DAY OF APRIL 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

RESOLUTION

Buenos Aires
May 23, 1986

Ministry of Economy

IN VIEW OF the provisions of Decree No. 772 of May 23, 1986 and

WHEREAS, in conformance with Art. 4 of Law No. 20,539, this MINISTRY OF ECONOMY has the power to impart general directives to the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA in matters of Economic, Monetary and Financial Policy:

THEREFORE,

THE MINISTRY OF ECONOMY OF THE NATION

RESOLVES:

ARTICLE 1—To extend payment of the capital maturity dates corresponding to REGISTERED BONODS in UNITED STATES DOLLARS ("BONODS") and "PROMISSORY NOTES" issued in conformance with Decree Nos. 1334 and 1336, both dated November 16, 1982, and No. 1603 dated December 21, 1982, and communication "A" 251 of the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA dated November 17, 1982.

ARTICLE 2—To propose to the registered holders of "BONODS" and to the authorized holders of "PROMISSORY NOTES" that the extension of those obligations be implemented domestically by means of provisional documents to be issued by the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA, as Financial Agent of the Government, in conformance with the terms and conditions established in Art. 3 of this Resolution.

ARTICEL 3—The extensions mentioned in this Resolution corresponding to maturity dates arising as of May 26, 1986 up until September 30, 1986 shall be for a period of ONE HUNDRED EIGHTY DAYS (180) from the respective maturity

dates. Interest shall be paid at the end of the extension period of ONE HUNDRED EIGHTY DAYS (180) in accordance with the following terms and conditions:

a) in the case of "BONODS" and "PROMISSORY NOTES" at LIBO rate, they shall bear interest of ONE AND THREE EIGHTHS PER CENT (1-3/8%) annually over the ONE HUNDRED EIGHTY DAY (180) LIBO rate;

b) in the case of "BONODS" and "PROMISSORY NOTES" at PRIME rate, they shall, at the creditor's option, bear interest of ONE AND THREE EIGHTHS PER CENT (1-3/8%) annually over the ONE HUNDRED EIGHTY DAY (180) LIBO rate or ONE PER CENT (1%) annually over the "PRIME" rate, which shall be substituted by ONE AND THREE EIGHTHS PER CENT (1-3/8%) annually over the ONE HUNDRED EIGHTY DAY (180) Certificate of Deposit rate adjusted for extensions beginning with official publication of the Law which authorizes that rate.

The additional rates established in a) and b) shall be subject to retroactive adjustment in conformance with the additional rates to be granted under the Argentine Financial Plan for 1986, as follows:

1) if that program becomes effective on June 30, 1986 or prior to that date, on the effective date of all extensions that have taken place beginning from May 26, 1986 inclusive;

2) if that program does not become effective on June 30, 1986 or before, but becomes effective on September 15, 1986 or on a previous date, the effective date of all the extensions that have taken place beginning from July 1, 1986 inclusive.

For any refinancing subsequent to those maturity dates, creditors may choose between the applicable LIBO rate or the applicable DOMESTIC rate. In the event the "BONOD" or "PROMISSORY NOTE" has been delivered to a creditor in guarantee of a private debt, the document of extension shall be retained in guarantee. In that case, the maturity date and foreign financial obligation for the debt originating in the

private sector must be the same as that provided in the document of extension.

THE CENTRAL BANK OF THE REPUBLIC OF ARGENTINA shall exchange, at any time during the period of extension and at the creditor's option, "BONODS" or "PROMISSORY NOTES" issued in guarantee of the debt of a borrower in the private sector, for another "BOND", "PROMISSORY NOTE", or provisional document that corresponds in payment of that debt of the private sector borrower.

ARTICLE 4—Upon the provisional extension established in Articles 2 and 3 of this Resolution, these obligations shall form part of the general program of refinancing applicable to any financial maturity dates arising in the period comprised in this program and they shall have the same terms and conditions to be established by that refinancing.

ARTICEL 5—To inform the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA, in its capacity as Financial Agent of the Government, to communicate to the registered or authorized holders of the documents described in Article 1 hereof that payment of capital by maturing installments is extended, in accordance with the terms and conditions mentioned in Article 3 and to authorize the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA to carry out the procedures for implementing the temporary extension, and then to include these obligations in the new program of general refinancing.

ARTICLE 6—For release, publication, delivery to the National Office of Official Registration, and filing.

[s/signature]
Juan Vital Sourrouille
Minister of Economy

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DE BANCNACION ARGENTINA NEW YORK MAY 23, 1986

TO: BANK LEUMI TRUST CO NEW YORK

ATTN: INTL'L DIVISION

LATIN AMERICA
ARGENTINE DESK

TLX 9004

WE RELAY THIS MESSAGE AT BANCO CENTRAL DE LA REPUBLICA ARGENTINA'S REQUEST, WITHOUT RESPONSIBILITY OR ENGAGEMENT ON OUR PART:

QUOTE" YOUR BANK HAS BEEN INDICATED TO BANCO CENTRAL OF ARGENTINA AS PAYING BANK BY SEVERAL HOLDERS OF BONOD'S AND/OR PROMISSORY NOTES.

WE KINDLY REQUEST YOU TO DELIVER TO THOSE HOLDERS, CUSTOMERS OF YOURS, A COPY OF THE FOLLOWING TELEX WITHOUT ANY RESPONSIBILITY ON YOUR PART. IN THE FOLLOWING DAYS, BANCO CENTRAL WILL BE TRANSMITTING TO YOUR BANK PAYMENT INSTRUCTIONS RELATED TO THE INTEREST PORTION OF BONOD'S AND PROMISSORY

NOTES FALLING DUE FROM 26TH MAY ONWARDS. THOSE PAYMENT INSTRUCTIONS WILL INCLUDE A COMPLETE LIST OF BENEFICIARIES TO WHOM WE WOULD WISH YOU TO DELIVER THE MESSAGE.

THOSE CUSTOMERS OF YOURS WHOM YOU MIGHT HAVE IDENTIFIED AS HOLDERS OF BONOD'S AND/ OR PROMISSORY NOTES.

OVER THE PAST FIVE YEARS ARGENTINA HAS HAD TO DEAL WITH A PERSISTENT SHORTAGE OF FOREIGN EXCHANGE THROUGH A COMPLEX SERIES OF ARRANGEMENTS INVOLVING THE REFINANCING OF PRINCIPAL MATURITIES OF PUBLIC AND PRIVATE SECTOR OBLIGATIONS, THE REFINANCING OF PRINCIPAL AND INTEREST MATURITIES OWED TO NON-ARGENTINE OFFICIAL AGENCIES, TRADE AND MONEY MARKET MAINTENANCE FACILITIES AND THE EXTENSION OF VERY SUBSTANTIAL NEW CREDITS FROM BANKS AND INTERNATIONAL ORGANIZATIONS IN ORDER TO HELP MEET THESE FOREIGN EXCHANGE SHORTAGES. AGREEMENTS WITH INTERNATIONAL ORGANIZATIONS, INCLUDING THE IMF AND WITH VARIOUS OTHER GOVERNMENTS. THROUGH THE SUCCESSFUL IMPLEMENTATION OF THIS COMPREHENSIVE PROGRAM A NECESSARY STABILITY HAS BEEN ESTABLISHED IN ARGENTINA'S FOREIGN EXCHANGE SITUATION.

CONSISTENT WITH THIS ONGOING PROGRAM AND IN ORDER TO IMPLEMENT ITS INTERNATIONAL MONETARY POLICY AND THIS POLICY OF EQUITABLY ALLOCATING AVAILABLE FOREIGN EXCHANGE SO AS TO ASSURE THE PARI PASSU TREATMENT OF CREDITORS, THE REPUBLIC OF ARGENTINA HAS IN THE EXERCISE OF ITS SOVEREIGN RESPONSIBILITIES, DIRECTED THE BANCO CENTRAL, ACTING AS ITS FISCAL AGENT, TO MAKE THE REQUEST SET FORTH BELOW, WHICH RELATES TO THE PRINCI-

PAL MATURITIES OF BONOD'S AND PROMISSORY NOTES.1

INTEREST ON ALL ROLLED OVER MATURITIES WILL BE PAID AS IT BECOMES DUE.

THE FOLLOWING PRINCIPLES APPLY TO EACH HOLDER OF BONOD'S AND/OR PROMISSORY NOTES AS IS APPROPRIATE TO THE CIRCUMSTANCES OF SUCH HOLDER:

A. TO HOLDERS OF A-251 LIBO RATE BONOD'S AND NOTES RECEIVED IN PAYMENT.

BANCO CENTRAL, ACTING AS FINANCIAL AGENT OF THE REPUBLIC OF ARGENTINA, REQUESTS ALL HOLDERS OF LIBO RATE PROMISSORY NOTES AND BONOD'S (THE "INSTRUMENTS") ISSUED PURSUANT TO THE A-251 PROGRAM RELATING TO EXCHANGE INSURANCE CONTRACTS AND RECEIVED IN PAYMENT TO AGREE TO A 180 DAYS ROLLOVER OF THE PRINCIPAL INSTALLMENTS OF SUCH INSTRUMENTS FALLING DUE BETWEEN MAY 1, 1986 AND SEPTEMBER 30, 1986. SUBJECT TO THE ADJUSTMENT REFERRED TO BELOW, INTEREST ON THE PROPOSED ROLLOVER SHALL ACCRUE AT 1 3/8 PERCENT PER ANNUM ABOVE THE 180 DAY LIBO RATE (AS SUCH INTEREST RATE IS DEFINED AND DETERMINED IN THE RESPECTIVE INSTRUMENT).

B. TO HOLDERS OF A-251 PRIME RATE BONOD'S AND NOTES RECEIVED IN PAYMENT.

BANCO CENTRAL, ACTING AS FINANCIAL AGENT OF THE REPUBLIC OF ARGENTINA REQUESTS ALL HOLDERS OF PRIME RATE PROMISSORY NOTES AND BONOD'S (THE "INSTRUMENTS") ISSUED PURSUANT TO THE A-251 PROGRAM RELATING TO EXCHANGE INSURANCE CONTRACTS AND RECEIVED IN PAYMENT TO AGREE TO A 180 DAYS ROLLOVER OF THE PRINCIPAL INSTALLMENTS OF SUCH INSTRUMENTS

FALLING DUE BETWEEN MAY 1, 1986 AND SEPTEMBER 30, 1986.
SUBJECT TO THE ADJUSTMENT REFERRED TO BELOW INTERESTS THE PROPOSED 180 DAYS ROLLOVER SHALL ACCRUE, AT THE OPTION OF THE REGISTERED HOLDER TO BE SPECIFIED IN SUCH HOLDER'S TELEX RESPONSE.

(I) AT 1 3/8 PERCENT PER ANNUM ABOVE THE 180 DAYS LIBO RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN BANCO CENTRAL COMMUNICATION A-278, THE "LIBOR RATE OPTION"), OR

(II) AT (A) IF THE ROLLOVER BEGINS ON OR PRIOR TO THE OFFICIAL PUBLICATION OF THE ENACTMENT OF A LAW AUTHORIZING A 180 DAYS ADJUSTED CERTIFICATE OF DEPOSIT RATE, ONE PERCENT PER ANNUM OVER THE PRIME RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN THE RESPECTIVE INSTRUMENT) (THE "PRIME RATE OPTION") OR

(B) IF THE ROLLOVER BEGINS AFTER THE OFFICIAL PUBLICATION OF THE ENACTMENT OF A LAW AUTHORIZING A 180 DAYS ADJUSTED CERTIFICATE OF DEPOSIT RATE, 1 3/8 PERCENT PER ANNUM OVER THAT RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN BANCO CENTRAL COMMUNICATION "A" 695) (THE "ADJUSTED CD RATE OPTION").

C. TO HOLDERS OF A-251 LIBO RATE BONOD'S AND NOTES RECEIVED IN GUARANTEE.

BANCO CENTRAL, ACTING AS FINANCIAL AGENT OF THE REPUBLIC OF ARGENTINA, REQUESTS ALL HOLDERS OF LIBO RATE PROMISSORY NOTES AND BONOD'S (THE "INSTRUMENTS") ISSUED PURSUANT TO THE A-251 PROGRAM RELATING TO EXCHANGE INSURANCE CONTRACTS AND RECEIVED IN GUARANTEE TO AGREE TO A 180 DAYS ROLLOVER OF

THE PRINCIPAL INSTALLMENTS OF SUCH INSTRUMENTS FALLING DUE BETWEEN MAY 1, 1986 AND SEPTEMBER 30, 1986. SUBJECT TO THE ADJUSTMENT REFERRED TO BELOW, INTEREST ON THE PROPOSED ROLLOVER SHALL ACCRUE AT 1 3/8 PERCENT PER ANNUM ABOVE THE 180 DAY LIBO RATE (AS SUCH INTEREST RATE IS DEFINED AND DETERMINED IN THE RESPECTIVE INSTRUMENT). THESE ROLLOVER INSTRUMENTS WILL CONTINUE TO BE HELD IN GUARANTEE AND THE MATURITY AND THE EXTERNAL FINANCIAL OBLIGATION OF THE UNDERLYING PRIVATE SECTOR DEBT SHOULD BE THE SAME AS PROVIDED IN THIS ROLLOVER. BANCO CENTRAL WILL AT ANY TIME DURING THE ROLLOVER PERIOD, AT THE OPTION OF THE CREDITOR, EXCHANGE A A-251 BONOD OR PROMISSORY NOTE ISSUED IN GUARANTEE OF THE DEBT OF A PRIVATE SECTOR BORROWER FOR ANOTHER A-251 BONOD OR PROMISSORY NOTE IN PAYMENT OF + PRIVATE SECTOR BORROWER'S DEBT.

D. TO HOLDERS OF A-251 PRIME RATE BONOD'S AND NOTES RECEIVED IN GUARANTEE.

BANCO CENTRAL, ACTING AS FINANCIAL AGENT OF THE REPUBLIC OF ARGENTINA, REQUESTS ALL HOLDERS OF PRIME RATE PROMISSORY NOTES AND BONOD'S (THE "INSTRUMENTS") ISSUED PURSUANT TO THE A-251 PROGRAM RELATING TO EXCHANGE INSURANCE CONTRACTS AND RECEIVED IN GUARANTEE TO AGREE TO A 180 DAYS ROLLOVER OF THE PRINCIPAL INSTALLMENTS OF SUCH INSTRUMENTS FALLING DUE BETWEEN MAY 1, 1986 AND SEPTEMBER 30, 1986.

SUBJECT TO THE ADJUSTMENT REFERRED TO BELOW, INTEREST ON THE PROPOSED 180 DAYS ROLLOVER SHALL ACCRUE, AT THE OPTION OF THE REGISTERED HOLDER TO BE SPECIFIED IN SUCH HOLDER'S TELEX RESPONSE.

(I) AT 1 3/8 PERCENT PER ANNUM ABOVE THE 180 DAYS LIBO RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN BANCO CENTRAL COMMUNICATION "A" 278 (THE "LIBO RATE OPTION"), OR

(II) AT (A) IF THE ROLLOVER BEGINS ON OR PRIOR TO THE OFFICIAL PUBLICATION OF THE ENACTMENT OF A LAW AUTHORIZING A 180 DAYS ADJUSTED CERTIFICATE OF DEPOSIT RATE, ONE PERCENT PER ANNUM OVER THE PRIME RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN THE RESPECTIVE INSTRUMENT) (THE "PRIME RATE OPTION") OR

(B) IF THE ROLLOVER BEGINS AFTER THE OFFICIAL PUBLICATION OF THE ENACTMENT OF A LAW AUTHORIZING A 180 DAYS ADJUSTED CERTIFICATE OF DEPOSIT RATE, 1 3/8 PERCENT PER ANNUM OVER THAT RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN BANCO CENTRAL COMMUNICATION "A" 695 (THE "ADJUSTED CD RATE OPTION").

THESE ROLLED-OVER INSTRUMENTS WILL CONTINUE TO BE HELD IN GUARANTEE AND THE MATURITY AND THE EXTERNAL FINANCIAL OBLIGATION OF THE UNDERLYING PRIVATE SECTOR DEBT SHOULD BE THE SAME AS PROVIDED IN THIS ROLLOVER. BANCO CENTRAL WILL AT ANY TIME DURING THE ROLLOVER PERIOD, AT THE OPTION OF THE CREDITOR, EXCHANGE A A-251 BONOD OR PROMISSORY NOTE ISSUED IN GUARANTEE OF THE DEBT OF A PRIVATE SECTOR BORROWER FOR ANOTHER A-251 BONOD OR PROMISSORY NOTE IN PAYMENT OF SUCH PRIVATE SECTOR BORROWER'S DEBT.

E. TO ARGENTINE PRIVATE DEBTORS WHICH RECEIVED A-251 LIBO RATE BONOD'S AND NOTES (THE "INSTRUMENTS") ISSUED IN THEIR NAME AND TO FOREIGN CREDITORS SECURITY

OF WHICH INDEBTEDNESS THE ARGENTINE PRIVATE DEBTORS PLEDGED SUCH INSTRUMENT.

BANCO CENTRAL, ACTING AS FINANCIAL AGENT OF THE REPUBLIC OF ARGENTINA, REQUESTS ALL ARGENTINE PRIVATE DEBTORS AND FOREIGN CREDITORS TO AGREE TO A 180 DAYS ROLLOVER OF THE PRINCIPAL INSTALLMENTS OF SUCH INSTRUMENTS FALLING DUE BETWEEN MAY 1, 1986 AND SEPTEMBER 30, 1986. SUBJECT TO THE ADJUSTMENT REFERRED TO BELOW, INTEREST ON THE PROPOSED ROLLOVER SHALL ACCRUE AT 1 3/8 PERCENT PER ANNUM ABOVE THE 180 DAY LIBO RATE (AS SUCH INTEREST RATE IS DEFINED AND DETERMINED IN THE RESPECTIVE INSTRUMENT).

THESE ROLLED-OVER INSTRUMENTS WILL CONTINUE TO BE HELD IN GUARANTEE AND THE MATURITY AND THE EXTERNAL FINANCIAL OBLIGATION THE UNDERLAYING PRIVATE SECTOR DEBT SHOULD BE THE SAME AS PROVIDED IN THIS ROLLOVER. BANCO CENTRAL WILL AT ANY TIME DURING THE ROLLOVER PERIOD, AT THE OPTION OF THE CREDITOR, EXCHANGE A A-251 BONOD OR PROMISSORY NOTE ISSUED IN GUARANTEE OF THE DEBT OF A PRIVATE SECTOR BORROWER FOR ANOTHER A-251 BONOD OR PROMISSORY NOTE IN PAYMENT OF SUCH PRIVATE SECTOR BORROWER'S DEBT.

F. TO ARGENTINE PRIVATE DEBTORS WHICH RECEIVED A-251 PRIME RATE BONOD'S AND NOTES (THE "INSTRUMENTS") ISSUED IN THEIR NAME AND TO FOREIGN CREDITORS IN SECURITY OF WHICH INDEBTEDNESS THE ARGENTINE PRIVATE DEBTORS PLEDGED SUCH INSTRUMENTS.

BANCO CENTRAL, ACTING AS FINANCIAL AGENT OF THE REPUBLIC OF ARGENTINA, REQUESTS ALL ARGENTINE PRIVATE DEBTORS AND FOREIGN

CREDITORS TO AGREE TO A 180 DAY ROLLOVER OF THE PRINCIPAL INSTALLMENTS OF SUCH INSTRUMENTS FALLING DUE BETWEEN MAY 1, 1986 AND SEPTEMBER 30, 1986.

SUBJECT TO THE ADJUSTMENT REFERRED TO BELOW, INTEREST ON THE PROPOSED 180 DAYS ROLLOVER SHALL ACCRUE, AT THE OPTION OF THE REGISTERED HOLDER TO BE SPECIFIED IN SUCH HOLDER'S TELEX RESPONSE.

(I) AT 1 3/8 PERCENT PER ANNUM ABOVE THE 180 DAYS LIBO RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN BANCO CENTRAL COMMUNICATION "A" 278 (THE "LIBO RATE OPTION"), OR

(II) AT (A) IF THE ROLLOVER BEGINS ON OR PRIOR TO THE OFFICIAL PUBLICATION OF THE ENACTMENT OF A LAW AUTHORIZING A 180 DAY ADJUSTED CERTIFICATE OF DEPOSIT RATE, ONE PERCENT PER ANNUM OVER THE PRIME RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN THE RESPECTIVE INSTRUMENT) (THE "PRIME RATE OPTION") OR

(B) IF THE ROLLOVER BEGINS AFTER THE OFFICIAL PUBLICATION OF THE ENACTMENT OF A LAW AUTHORIZING A 180 DAY ADJUSTED CERTIFICATE OF DEPOSIT RATE, 1 3/8 PERCENT PER ANNUM OVER THAT RATE (AS SUCH RATE IS DEFINED AND DETERMINED IN BANCO CENTRAL COMMUNICATION "A" 695 (THE "ADJUSTED CD RATE OPTION").

THESE ROLLED-OVER INSTRUMENTS WILL CONTINUE TO BE HELD IN GUARANTEE AND THE MATURITY AND THE EXTERNAL FINANCIAL OBLIGATION OF THE UNDERLYING PRIVATE SECTOR DEBT SHOULD BE THE SAME AS PROVIDED IN THIS ROLLOVER.

BANCO CENTRAL WILL AT ANY TIME DURING THE ROLLOVER PERIOD, AT THE OPTION OF THE CREDITOR, EXCHANGE A A-251 BONOD OR PROMISSORY NOTE ISSUED IN GUARANTEE OF THE DEBT OF A PRIVATE SECTOR BORROWER FOR ANOTHER A-251 BONOD OR PROMISSORY NOTE IN PAYMENT OF SUCH PRIVATE SECTOR BORROWER'S DEBT.

THE GOVERNMENT OF ARGENTINA INTENDS TO INCLUDE ITS NEW FINANCING PROGRAM TO BE ISSUED TO THE INTERNATIONAL BANKING COMMUNITY IN 1986, A PROPOSAL FOR THE REFINANCING OF THESE ROLLED-OVER MATURITIES TOGETHER WITH OTHER MATURITIES OF THESE INSTRUMENTS OCCURRING DURING THE YEAR FOR WHICH REFINANCING OF THE PUBLIC SECTOR DEBT IS REQUESTED, WHICH IN TOTAL REPRESENT DOLLAR 3.8 BILLION, ON A BASIS SIMILAR TO OTHER PUBLIC AND PRIVATE SECTOR DEBT.

THEREFORE, AS WE HAVE REQUESTED WITH OTHER MATURITIES FALLING DUE DURING THIS SAME PERIOD, WE ARE ALSO REQUESTING, AS PART OF THIS ROLLOVER REQUEST, THAT THE MARGIN FOR THE ABOVE REQUESTED ROLLOVER BE RETROACTIVELY ADJUSTED TO THE MARGIN PROVIDED IN THE NEW FINANCING PROGRAM (I) IF SUCH PROGRAM IS ISSUED ON OR PRIOR TO JUNE 30, 1986, TO THE VALUE DATE OF ALL ROLLOVERS OCCURRING ON OR AFTER MAY 1, 1986 OR (II) IF SUCH PROGRAM IS NOT ISSUED ON OR PRIOR TO JUNE 30, 1986 BUT IS ISSUED ON OR PRIOR TO SEPTEMBER 15, 1986, TO THE VALUE DATE OF ALL ROLLOVERS OCCURRING ON OR AFTER JULY 1, 1986.

WE WOULD APPRECIATE YOUR CONFIRMATION OF YOUR ACCEPTANCE TO THE ROLLOVER HEREIN REQUESTED BY REMITTANCE OF THE FOLLOWING TELEX TO BANCO CENTRAL.

UPON RECEIPT OF THE ACCEPTANCE FORM DULY SIGNED, BANCO CENTRAL WILL DELIVER TO YOU THE RELEVANT COUPON STATING THAT INTEREST HAS BEEN PAID AND PRINCIPAL WILL BE SUBJECT TO A 180 DAYS ROLLOVER.

SIGNATURE

ACCEPTANCE FORM

TO: BANCO CENTRAL DE LA REPUBLICA
ARGENTINA
DEPARTAMENTO DE DEUDA PUBLICA
(NAME OF INSTITUCION) IS THE HOLDER OF
BONOD
NUMBER IN THE FACE AMOUNT OF
WITH A PRINCIPAL MATURITY DATE OF
WE HEREBY AGREE TO ROLL OVER THIS
PRINCIPAL MATURITY FOR 180 DAYS ON THE
TERMS SET FORTH IN THE TELEX DATED
FROM THE BANCO CENTRAL. THE BASE RATE FOR
INTEREST ON THIS ROLLOVER SHALL BE .

REGARDS

ALFREDO J. CONCEPCION
PRESIDENT
BANCO CENTRAL DE
LA REPUBLICA
ARGENTINA

MARIO BRODERSOHN
SECRETARY OF TREASURY

UNQUOTE

REGARDS

BANCNACION NEW YORK

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WE DISCONNECT

Elapsed time 00:41:35

PRINTED AT 1905 EST 05/27/86

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss. :
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S184E is an accurate, true and complete rendition from Spanish into English of Banco Central de la Republica Argentina ANNUAL REPORT 1983 to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ OLGA GARDNER
By Olga Gardner
Assistant Director, Translations

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 16TH DAY OF APRIL 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4248203
Qualified in Kings County
Commission Expires Jan. 27, 1991

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

BCRA ANNUAL REPORT
1983

INTRODUCTION

For the Argentine economy, the year 1983 marks the culmination of a process initiated halfway through the last decade that generated one of the most profound crises in the country's history. The economic policy adopted during the year was oriented towards managing that crisis. Despite the efforts made, the transfer of power to the constitutional government took place in a setting characterized by increased inflationary pressures, fiscal and financial imbalances, and an inconclusive, unconsolidated process of foreign debt renegotiation.

Against this backdrop, the Argentine economy has been distinguished by three basic characteristics, all of which have contributed to bringing about the present state of affairs. First and foremost, a high inflation rate: while prior to 1964 the annual inflation indices had exceeded 100% only in the year 1959, starting in 1975 they were never below this percentage, with the single exception of the index of wholesale price increases, which was 75.4%. Second, the economy showed a persistent tendency to fall into recessive situations: while the gross national product (GNP) declined in only four of the twenty-five years prior to 1975 (none of them in the ten-year period preceding 1975), it declined in five of the nine years between 1975 and 1983. As a result, the per-capita GNP was lower in 1983 than it had been in 1970, with significant reductions in the real wages of huge segments of the population brought about by decreased actual wages and an aggregate increase in unemployment and underemployment rates in the area of labor. The case was similar with investment, a fact of great importance since the development of investment creates the climate for long-term economic progress.

Headings to graphs:

1. Consumer Price Index
   Variations between general levels and those of previous year.

2. Progress of GNP
   By factor cost
   Variations from previous year.

Finally, the Argentine foreign debt, which had been 7,875 million dollars in 1975, slightly surpassed 45,000 million dollars in 1983. Some macroeconomic indicators provide illustrations of the seriousness of the situation generated by the process of indebtedness. Thus foreign debt, which at the end of 1975 was equivalent to somewhat less than three times the exports for that year, came to represent almost six times the exports for the year 1983. The annual interest generated by foreign debt at the end of 1975 amounted to approximately 1% of the gross national product, 4% of national savings, and 16% of exports. By 1983 these relationships had reached about 8%, 67% and 70% respectively.

The economic policy implemented as of April 1976 was geared toward reversing the development model of preceding decades, basically with respect to the roles of the foreign sector and the State. In accordance with that strategy, Argentina's full participation in world markets for capital and merchandise would constitute a fundamental pillar of sustained, long-term economic growth. Similarly, the reproportioning of State structures through size reduction and modifications of function would free up productive elements to be more efficiently used by the private sector. All of this was to take place as part of an economic plan in which the market would regain its central place in the allocation of resources.

The achievement of these long-term objectives was conditioned upon abatement of the inflationary process, and not merely with respect to the levels recorded since 1975. It was

hoped that in the future, the rate of price increases would bear some relationship to international averages.

The anti-inflationary measures implemented were based, initially, upon the decline in actual wages, followed by a phasae called a price "truce" and then by "disindexation" of the economy, which translated into a delay in adjusting certain key macroeconomic variables. After a deceleration in the inflationary process achieved in the first months, the steps described were incapable of reducing the minimum price increase levels below about 150% annually (the percentage recorded for the years 1977 and 1978).

At the end of 1978, the failure of stabilization efforts led economic authorities, for anti-inflationary reasons, to utilize long-term instruments associated with the so-called "monetary focus of the balance of payments."

The financial reforms of June 1977, which made the free determination of interest rates possible, was complemented by the elimination of restrictions on capital import and export. Since Argentina was a relatively small borrower in the international credit market, it was hoped that domestic interest rates would end up adjusting to international ones, taking into consideration shifts in exchange rates, transaction costs and risk premiums.

On the other hand, it was thought that by controlling the pace of devaluation, domestic prices would adapt to the devaluation rate and to that of international inflation. If established in a decreasing pattern, this would simultaneously abate inflationary expectations and eliminate uncertainties concerning exchange rates.

All this notwithstanding, in order to achieve a degree of congruency between domestic and international prices, the policy of currency exchange delay was complemented with a slower rate of price adjustments and a reduction in import duties at a more accelerated pace than had originally been envisioned in the plan which had contemplated gradually reducing protection levels until 1989. As a result, typical

instruments of resource allocation such as the policy on customs duties were denatured by being subordinated to the objective of reducing inflation.

Between 1979 and the beginning of 1981, the above policies aggravated external imbalances and resulted in the dismantling of vast sectors of industry, in addition to increasing insolvency on part of domestic borrowers. The external imbalances were associated with currency exchange delays, which produced a deficit in the trade balance as of the end of 1979, combined with the increasing burden of foreign indebtedness and speculative activity due to the profit to be derived from the spread between domestic and international interest rates. High interest rates internally, resulting from currency exchange risk and political incertainty, and further stimulated by the coexistence of free rates and officially guaranteed deposits, aggravated the debtors' situation and generated one of the most profound financial crises in our country's economic history. Starting early in 1980, the flight of private capital was attenuated by more substantial foreign borrowing on the part of official agencies. In that year and in the first quarter of 1981 the departure of capital for unspecified reasons exceeded 10,000 million dollars.

In early 1981 the growing imbalances between the external sector and internal money markets made it necessary to abandon the policy of anticipated devaluations. Conditions for subsequent development of the Argentine economy were defined in that period: from then on, foreign and fiscal accounts would suffer permanent imbalances; the financial sector would find itself incapable of fulflilling its intermediary function in an efficient and disciplined manner; inflation indices would accelerate, and the production sector would enter a prolonged period of recession.

Starting halfway through 1981, continual adjustments to exchange rates and later to prices, designed to recover funds lost as a result of late payments, contributed significantly to accelerate the inflationary process. The policy of nonmonetary deficit financing was abandoned in favor of a

return to the use of issues as a source of revenue. Price decontrol in the money markets was further aggravated by the practice of rediscounting to financial agencies to stave off the collapse of the system, beleaguered as it was both by its own deficiencies and by the insolvency of debtor companies. Such companies had to pay, in real terms, ever-higher interest rates in the midst of an economic recession. Furthermore, the difficulties that had to be faced with respect to international reserves led to the implementation of a schedule of foreign currency exchange and compensation through modifications in the exchange rate, which, implicitly, amounted to subsidizing companies with foreign debt.

To the internal factors we have analysed must be added, particularly from 1981 on, the adverse effects brought about by international merchandise and credit markets. The recession in industrialized countries was having unfavorable repercussions throughout world trade, provoking a sharp reduction in the international prices of products exported by Argentina—18% between the last quarter of 1981 and 1982—greater than the decrease in prices of imports to the country, at a time when international finance markets were recording increasing restrictions of funds caused by interest rate hikes. The combination of high nominal interest rates and deteriorating terms for currency exchange gave rise to strongly positive interest rates in real terms, which contributed to aggravate the situation brought about by the process of foreign indebtedness.

During the first half of 1982 the emphasis of economic policy again focused on attacking inflation, adjusted variables being wages and prices. In particular, nominal salary increases authorized for the private sector were lower than the inflation rate and a reduction of public spending was achieved by freezing public-sector employees' wages and reducing other expenditures, both current and capital-related. This policy, added to significantly positive interest rates in real terms, contributed to worsening the companies' capital situation.

In July of 1982, a financial reform measure was implemented as part of a policy designed to reduce business liabilities in real terms and to reinvigorate the level of economic activity. The first objective was achieved, basically,

Heading to graph:

1. Gross Industrial Production
   Variations with relation to same period of previous year.

through a reduction in nominal interest rates and their sharp decline in real terms, thus bringing about a significant reduction in companies' debts to the banks. This contributed to the reorientation of financial fluctuations to meet the demand for goods, and brought about a reversal of the decline in industrial production that had lasted for ten consecutive quarters. At the same time, exchange regulations were adopted that recognized the duality of the market—commercial and financial—with a major adjustment in exchange rates. The negative cost effects of these measures to companies with foreign debt were counteracted with an exchange-rate insurance schedule based on the rate that had been current prior to implementation of the reform measures.

The pace of inflation picked up during the second quarter, basically due to monetary imbalance caused by the July measures, the hike in exchange rates in real terms, and increased inflationary expectations.

By the end of 1982 the Argentine economy faced the reality that the imbalances resulting from the policies of preceding years had become significantly more marked, giving rise to a situation characterized by unprecedented foreign debt, economic recession and deindustrialization, a high inflation rate and considerable distortion if relative prices.

The problem of foreign debt had been aggravated by the interest that had to be paid out at the maturity of a strong concentration of short-term instruments, as well as by restricted access to credit in the international capital market.

The GNP dropped sharply for the second consecutive year, settling at a level slightly below that recorded ten years earlier, although as of the third quarter of 1982 some signs of industrial revitalization were recorded. During the second quarter, the monthly inflation rate had reached two-digit figures and a far more accelerated pace than was seen during the first half of the year. Finally, certain relative prices key to the economy showed

Headings to graphs:

1. Gross Product and Man-Hours Worked in Manufacturing
   Base 1970 = 1
   Gross industrial product (GIP)
   Man-hours worked

2. Progress of Real Public Prices
   Base 1978 = 1
   Adjusted to consumer price index
   Adjusted to national non-agricultural price index

significant deviations from values which would have been considered normal based on historical averages. Levels relating to wages and prices were markedly depressed.

The highest priority of the economic program implemented at the end of 1982 and continued throughout 1983 was to alleviate the restrictions emerging from the foreign sector. During the first quarter of 1983, there were basically two economic policy measures tending towards this objective: the acquisition of additional medium- and long-term foreign loans and the maintenance of high foreign exchange rates that had prevailed during the last quarter of 1982. To handle commitments resulting from foreign-debt repayment dates, various types of transaction were effected, among which should be mentioned IMF loans, bridge loans and medium-term loans from commercial banks, short-term extensions on payment dates of public-sector debt, the renewal of swap transactions and the refinancing of currency exchange insur-

ance transactions through the issuance of instruments transferring these debts from the private to the public sector.

The significant business surplus indicated by first-quarter figures—resulting from the combination of an outstanding agricultural harvest and the low level of imports associated with a recessive situation, stocks of imported merchandise and limitations imposed on the importation of products from abroad, as

Headings to graphs:

1. Wholesale Consumer Price Index
   Variations between general levels and those of previous year.
   Prices to consumer
   Wholesale prices

2. Global Liquidity Coefficients
   Monetary resources/GIP
   (1) Monetary resources shown are geometric averages of monthly observations of monetary aggregates, adjusted to the Wholesale Price Index (general level). The GIP is calculated by market prices in millions of [illegible] for 1970.

   Note: Total monetary resources are monthly averages of daily balances of bills and monies under the control of economic units not [illegible] to the ensemble of financial entities and deposits and obligations in favor of the public and private sectors, subject to minimum cash, deposits at the free rate (as of June 1982) and deposits from entities in liquidation.

well as the financial strategy mentioned previously—made it possible to diminish the level of late payments as well as adding flexibility to payment conditions for imported merchandise.

The slight recovery in economic activity noted in the first quarter was accentuated in the course of the second. The

principal dynamizing factor in this process was a revitalization of industry following extremely depressed 1982 levels. The growth of industry was supported by a reduction in imports—which declined due to the maintenance of a high real exchange rate—and by certain quantitative restrictions on importing merchandise from foreign countries. Following the highs recorded for January and February, the inflation rate tended to decelerate in subsequent months. Several factors influenced this first-quarter development in the economy. First, the currency exchange policy, in contrast to the last quarter of 1982, indicated only maintenance of the exchange rate in real terms. Second, for some months reasonable control was achieved over monetary aggregates and the increasing demand for financial assets, caused by more-or-less neutral interest rates in real terms. In any event, the degree of monetization of the economy—measured as the realationship between monetary resources and the GIP—just exceeded 14% in the second quarter, this being the highest recorded for the year. Price controls implemented at the end of 1982 for the leading companies (which had to justify all price increases by providing evidence of increased costs) also contributed to this result.

The correction of relative price distortions came under attacked by public wage and price adjustments.

During the first quarter some encouraging signs were noted with respect to the possibility of controlling the serious economic situation—which was imperative—and gradually correcting existing imbalances. A slight industrial recovery, a growth of public wages and prices in real terms, a degree of control over money markets and the fiscal situation, and certain progress in the renegotiation and restructuring of the foreign debt were noted.

Nevertheless, by the middle of 1983 it was becoming apparent that this situation was temporary and that it would soon suffer a sharp deterioration.

The improvement in real wages, which started gradually, is accelerating rapidly in a climate characterized by economic

revitalization, greater negotiating capacity on the part of unions, and political expansion. As a result of nominal salary increases and public price adjustments, the pace of inflation is accelerating, so that regulated interest rates—which in the first months of this year were more or less in line with the growth rate of prices—turned negative in real terms, aggravating financial market imbalances. In addition, the terms of the foreign debt renegotiation were such that the availability of funds was contingent upon the achievement of economic policy objectives stiulated by the agreements. The failure to meet agreed-upon targets has therefore affected debt renegotiations and has further damaged the country's external situation in general.

In the second half of the year, then, we see a generalized accentuation of imbalances existing in the primary markets, and of prices in relation to key macroeconomic variables. Given this economic picture, to which we must add the uncertainty caused by impending change in the political situation, it was hoped that the economic leaders and sectors would make decisions designed primarily to improve their relative position in the struggle for income distribution. Wage and price increases have indeed been followed by price increases for goods and services, and, consequently, a continual reaccommodation of relative prices. Nevertheless, wages have grown faster than prices, so that in the third quarter there was a further improvement in real wages.

During the third quarter the external situation deteriorated again, due to the slower pace of adjustment for official parity of the dollar and negative interest rates in real terms, which fact affected the existing gap between the official and marginal quoted prices for the dollar. Furthermore, the increased flexibility in payment periods for first-quarter imports considerably increased disbursements for that item in September. In addition, by the end of the quarter there were still arrears with respect to foreign obligations amounting to 1,145 million dollars, which rose to 3,222 million by year's end.

The public sector showed an ever-widening gap between income and expenses. On the one hand there was a substantial reduction in tax revenues, despite the reinvigorated economy, basically due to a steep escalation in the incidence of tax evasion and deferral of fiscal obligations. On the other hand, significant increases were seen in the wages of public sector employees. Given this picture, we can only expect a steep increase in the government's operating deficit.

Headings to graphs:

1. Progress of Real Wages (INDEC)
   Index of industrial worker's normal hourly salary adjusted to the consumer price index.
   Base: January 1982 = 1

2. Progress of Real Exchange Rate
   Index of seller exchange rate adjusted to consumer price index.
   Base: 1978 = 1

[LETTERHEAD OF RENNERT BILINGUAL TRANSLATIONS]

AFFIDAVIT OF ACCURACY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

This is to certify that the attached translation no. S04110-183E is an accurate, true and complete rendition from Spanish into English of Decree No. 1379 of August 19, 1987 and External Debt Records 1979, 1980 and 1981 to the best of my knowledge and belief.

RENNERT BILINGUAL TRANSLATIONS

/s/ MIKAEL E. POULSEN
By Mikael E. Poulsen
Director

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 11TH DAY OF APRIL, 1990

/s/ BRUCE J. LEVINE
BRUCE J. LEVINE
NOTARY PUBLIC,
STATE OF NEW YORK
NO. 24-4946203
Qualified in Kings County
Commission Expires Jan. 27, 1991

Translation No. S04110-183E

1379

NATIONAL
EXECUTIVE BRANCH

[Stamp: MINISTRY OF THE ECONOMY 14/18 Page 11]

Buenos Aires
August 19, 1987

Having reviewed the Financing Plan for the REPUBLIC OF ARGENTINA for the year 1987 and the "General Principles of Refinancing for Borrowers in the Argentina Public Sector for the Year 1987" included therein:

WHEREAS,

Pursuant thereto, the MINISTRY OF THE ECONOMY and the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA have arranged with public-sector banks providing foreign-currency credit to refinance capital debts which have come due and which will come due as of January 1, 1987, also including in such refinancing the amortization of capital included in the Guaranteed Refinancing Contract approved by Decree No. 1579 of August 22, 1985; the refinancing of bonds originally issued between 1982 and 1985 to pay for transactions covered by exchange-rate insurance, which have come due or are about to come due; and the Guaranteed Refinancing Contract for the debt of AEROLINEAS ARGENTINAS SOCIEDAD DEL ESTADO [the State-owned Argentinian airline], approved by Decree No. 2419 of September 15, 1983; and

WHEREAS,

The unpostponable need to honor commitments entered into, and the high priority of deadlines which must be met in order to normalize our foreign payment schedule, make it necessary to prescribe measures intended to address these needs; and

WHEREAS,

Consequently, a draft contract has been prepared which responds to these requirements whose text reflects the content negotiations between representatives of the MINISTRY OF THE ECONOMY and the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA, in consultation with Argentinian public sector borrowers and creditor bank representatives; and

[Marginal notation:
236 and a series of
initials, flourishes,
etc.]

NATIONAL
EXECUTIVE BRANCH

[Stamp: MINISTRY OF THE ECONOMY 15/18 Page 12]

WHEREAS,

As an alternative possibility for the creditor banks, in the course of the negotiations for the 1987 Financing Plan it was agreed that the REPUBLIC OF ARGENTINA, through the CENTRAL BANK OF THE REPUBLIC OF ARGENTINA in its capacity as finance agent for the STATE and the NATION, would issue Alternative Share Instruments under the conditions set forth in the respective draft conversion agreement, to come due in TWENTY-FIVE (25) years with a TWELVE (12) year grace period and a FOUR PERCENT (4%) annual fixed interest rate; and

WHEREAS,

The fact that the national interest is at stake justifies the REPUBLIC OF ARGENTINA in arranging and guaranteeing the refinancing contract to be entered into, and in proceeding to confirm signature and deposit agreements for the above-mentioned Alternative Share Instruments as well as all payment instruments which may be established and/or issued in fulfilling obligations that arise from such contracts and agreements; and

WHEREAS,

The Secretary of the National Treasury has affirmatively issued the pertinent legal directives; and

WHEREAS,

In accordance with the faculties conferred by Article 86, subclause 1 of the National Constitution, Article 48 of Law No. 16.432, incorporated in Complementary Permanent Budget Law No. 11.672, and modified by Article 7 of Law No. 20.548, Article 13 of Law No. 23,526 and Article 59 of the Stamp Tax Law, text mandated in 1986, and modifications thereto, the EXECUTIVE BRANCH finds itself autho-

rized to approve, contract and guarantee transactions such as those submitted for your consideration.

[Marginal notation:
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initials, flourishes,
etc.]

NATIONAL
EXECUTIVE BRANCH

[Stamp: MINISTRY OF THE ECONOMY 16/18 Page 13]

NOW, THEREFORE,

THE PRESIDENT OF THE ARGENTINE NATION DECREES

ARTICLE 1. Approval, in all its parts, of the draft "Guaranteed Refinancing Contract" the text of which, in Spanish and in English, consisting of THIRTEEN (13) sections and FORTY-NINE (49) annexes, forms an integral part of this Decree as Annex I, for signature by the following parties:

a) The debtors listed on the signature pages of the said contract, in their capacity as borrowers;

b) THE CENTRAL BANK OF THE REPUBLIC OF ARGENTINA in its capacity as such, or as borrower;

c) THE REPUBLIC OF ARGENTINA, in its capacity as borrower or as guarantor; and

d) A consortium of Banks, the members of which are listed on the signature pages of the said contract, in their capacity as lenders and Agent Banks.

ARTICLE 2. THE CENTRAL BANK OF THE REPUBLIC OF ARGENTINA is hereby authorized, in its capacity as Financing Agent of the REPUBLIC, to issue bonds of public debt, the purpose of which shall be to refinance bonds originally issued between 1982 and 1985 to pay for transactions covered by exchange-rate insurance, which have come due or are about to come due; and authority is hereby delegated to THE CENTRAL BANK OF THE REPUBLIC OF ARGENTINA to establish the text thereof, subject to the limitations provided by Decree No. 1336/82, dated November 26, 1982 with respect to extension of jurisdiction and the financing conditions set forth in the Financing Plan for the REPUBLIC OF ARGENTINA for 1987.

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initials, flourishes,
etc.]

NATIONAL
EXECUTIVE BRANCH

[Stamp: MINISTRY OF THE ECONOMY 17/18 Page 14]

ARTICLE 3. Any and all approvals and/or authorizations from the NATIONAL EXECUTIVE BRANCH which may be required in accordance with regulations currently in force so that any person being a party to the "Guaranteed Refinancing Contract," the "Alternative Share Instruments Conversion Contract," the "Contract of Deposit" and the "Alternative Share Instrument" may subscribe to or assume any of the commitments stipulated therein or take actions necessary to or required for compliance with its provisions, must be considered authorized upon issuance of the instant Decree. The above-mentioned "Guaranteed Refinancing Contract" shall be operative for each one of the borrowers that shall sign it, upon approval by their respective governing and administrative bodies.

ARTICLE 4. The Minister of the Economy, or such officer or officers as he may designate, is hereby authorized to sign, in representation of the REPUBLIC OF ARGENTINA in its capacity as guarantor and borrower, the contracts and instruments referred to in Article 1 of this Decree and any and all other documents and instruments required by, referred to in, or related to such contracts and instruments.

ARTICLE 5. The Minister of the Economy, or such officer or officers as he may designate, is hereby empowered, in name and representation of the REPUBLIC OF ARGENTINA, to agree to and sign modifications to the contracts and instruments whose texts are approved by Article 1 of this Decree, provided that such modifications do not constitute substantial changes to the purpose thereof, do not result in an increase in the amount thereof, and do not modify the jurisdiction and immunity clauses agreed to therefor.

ARTICLE 6. The contracts and instruments approved by Article 1 of this Decree, and all instruments and documents referred to therein or related thereto, are hereby declared

exempt of stamp tax, by virtue of the faculties conferred upon the NATIONAL EXECUTIVE BRANCH by Article 59 of the Stamp Tax Law, the text of which was mandated in 1986, and the modifications thereto.

The instant Decree shall be communicated, published and delivered to the National Official Records Bureau and shall be filed.

DECREE No. 1379

[Official stamps and signatures, including that of the Secretary of the Treasury and the Minister of the Economy]

[Marginal notation: 236, 2036-2 and a series of initials, flourishes, etc.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 6926 (JES)

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC., and BANK CANTRADE,

Plaintiffs

—against—

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT

RICHARD W. CUTLER, counsel for plaintiffs having been duly sworn, hereby deposes and says in opposition to defendants' motion to dismiss the complaint as follows:

1. This is a collection case. Plaintiffs sue to collect on bonds issued by the defendants in 1982 and denominated in United States dollars (the "Bonods"). The argument of this motion is set forth in our accompanying Memorandum of Law, and the purpose of this Affidavit is to place before the court certain materials to which we refer in that Memorandum. In order to avoid any dispute as to translation, our Exhibits "A", "B", and "C" are taken directly from defendants' submissions.

2. The Bonods specifically provide that the interest and principal are payable in New York City (and other financial centers) at the holders' election. [Exhibit "A", Bonod terms

in English, § 3(d)] Two plaintiffs are assignees of original holders (Weltover, Inc. and Springdale Enterprises, Inc.), and one plaintiff is an original holder (Bank Cantrade, A.G.) [*e.g.*, Exhibit "F"]. They have all demanded payment in New York, but defendants have failed to pay.

3. In the course of our discussion of the commercial nature of the issuance of the Bonods, we ask the court to consider that Banco Central required a fee of .1% on the amount of securities. [Exhibit "B", Decree #1334, § 6] On an issue of $1,200,000,000—to which defendants' affiant swears—that commission amounts to $1,200,000.

4. In the course of our discussion of defendants' waiver of their jurisdictional defenses, we ask the court to consider that defendants decreed that jurisdiction would be extended to the courts of New York and other financial centers. [Exhibit "C", Decree #1336, § 3(g)]*

5. In the course of our discussion of personal jurisdiction of the defendants, we ask the court to take judicial notice that Argentina has maintained consulates throughout the United States for years. Exhibit "D" is a copy of pages from the Manhattan telephone directory for the period 1982 to the present showing a listing in each of those years for the Argentine consulate and a trade or commercial office. Exhibit "E" is a copy of pages from the San Francisco telephone directory for the same period showing a listing for the Argentine consulate.

6. Defendants' affiant says that payment "is not possible at this time" because defendants have promulgated foreign exchange regulations which prohibit such payment. [Marx Affidavit, § 14] Of course, payment is very possible—the defendants simply choose to do other things with their money. In this regard defendants—their governmental status notwithstanding—are no different from other debtors sued

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* Defendants' translation contains a minor typographical error: It denotes two sub-sections as "(g)". We refer to the "real" subsection (g) at the top of the page designated by the translator as #8.

on their obligations in any court. They say that they want to reform their financial system. They can begin by meeting their legal obligations.

/s/ RICHARD W. CUTLER
Richard W. Cutler

SWORN TO BEFORE ME THIS 29TH
DAY OF MAY, 1990

/s/ [ILLEGIBLE]
Notary Public
[ILLEGIBLE]
No. 31-3665675
Qualified in New York County
Commission Expires March 10, 1992

PETITIONER'S

BRIEF

QUESTIONS PRESENTED

1. Whether the relevant actions of the Republic of Argentina and Banco Central de la Republica Argentina constitute commercial activity within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

2. If so, whether those actions caused a direct effect in the United States sufficient to confer subject matter jurisdiction over this action pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-763

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF REPUBLIC OF ARGENTINA AND BANCO CENTRAL DE LA REPUBLICA ARGENTINA

Petitioners respectfully request that the decision of the United States Court of Appeals for the Second Circuit, entered on August 31, 1991, be reversed for the reasons set forth herein, and that the Complaint in this action be dismissed.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-15a) is reported at 941 F.2d 145 (2d Cir. 1991). The opinion

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1 The caption in this Court contains the names of all parties.

of the district court (Pet. App. B at 16a-29a) is reported at 753 F. Supp. 1201 (S.D.N.Y. 1991).

JURISDICTION

A. The decision of the Court of Appeals for the Second Circuit affirmed an order of the District Court for the Southern District of New York which denied Petitioners' motion to dismiss the complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (the "FSIA" or the "Act"). Jurisdiction in the court of appeals rested upon the "collateral order doctrine" (Pet. App. A at 2a) (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)).

B. The judgment of the court of appeals was entered on August 13, 1991. The Petition for a Writ of Certiorari was filed on November 8, 1991, and was granted on January 10, 1992.

C. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act provides in relevant part as follows:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§ 1603. Definitions

For purposes of this chapter—

. . . .

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

STATEMENT OF THE CASE

This action arises from the attempt by three foreign entities, with no discernible connection to the United States, to use United States courts to compel the Argentine Government to perform under the terms of certain instruments issued in Argentina in 1982 in connection with implementation of the Government's foreign exchange policies. These instruments, titled Registered Bonds Denominated in United States Dollars—called "Bonods"—raised no capital, and were not used to finance the acquisition of any goods or services. Rather, they were created and issued by the Argentine Government as necessary steps in its administration of the Government's own obligations under a program designed to assure access to foreign exchange, in order to avoid a credit crisis within the country's private sector.

Foreign exchange—currency that is internationally accepted—is critical to Argentina's economy, because its own currency, like that of many other countries, is not accepted in

cross-border transactions. Because of the central importance of foreign exchange to Argentina's economy, as well as the need to ensure the availability of adequate foreign exchange to fulfill sovereign obligations, foreign exchange policy is a central component of the Government's economic program. Under the policies in effect during the relevant period, inflows and outflows of foreign exchange were carefully controlled by the various economic authorities, including the Petitioners. Respondents' claims in this lawsuit directly challenge actions of the Argentine Government integral to those policies.

1. The Parties

The Republic of Argentina is a foreign state as defined by Section 1603(a) of the FSIA (J.A. 6, ¶ 4), and Banco Central de la Republica Argentina ("Banco Central") is an agency or instrumentality of the Republic under the Act (J.A. 6-7, ¶ 5). Pursuant to Argentine law, Banco Central acts as "the State's financial agent," and its "economic, financial, monetary and currency-exchange counsel" (J.A. 57). Its responsibilities include, *inter alia*:

> Regulation of credit within Argentina, for the purpose of fostering economic development and to protect the purchasing power of Argentine currency;
>
> Administration of the nation's reserves of gold, currency and other assets;
>
> Development of Argentina's capital market; and
>
> Supervision of the liquidity and operation of the financial market.

(J.A. 56-57). Banco Central is empowered to "buy and sell in the public securities market for the purpose of regulation" (J.A. 64); issue public securities on behalf of the government (*id.*); and to coin money (J.A. 62). Pursuant to its Charter, Banco Central acts "on behalf of the national government in the placement of public loans . . . and in handling foreign and domestic public-debt service" (J.A. 67). Banco Central's

Charter expressly provides that it is prohibited from participating "directly or indirectly in any commercial . . . enterprise" (J.A. 64).

The three Respondents who seek to compel payment[2] through the United States courts—Weltover, Inc. ("Weltover"), Springdale Enterprises, Inc. ("Springdale"), and Bank Cantrade, A.G. ("Cantrade")—are foreign corporations. Specifically, Weltover and Springdale are Panamanian corporations (J.A. 6, ¶¶ 1, 2), and Cantrade is a bank corporation organized and existing under the laws of Switzerland (J.A. 6, ¶ 3). Respondents have no presence or activity in the United States, and no connection with this country or the State of New York, other than their requests to have Banco Central deposit payments under the Bonods into bank accounts in New York (J.A. 8-11, ¶¶ 13, 19, 26, 33).

2. The Sovereign Actions of the Argentine Government

The origins of Argentina's persistent and critical shortage of foreign exchange date back to the 1970's and early 1980's, when Argentina, like many other nations, borrowed funds from external sources in order to deal with domestic economic problems. This borrowing was undertaken by the Argentine private sector as well as by the Government and its various agencies (J.A. 15-16, ¶ 6; 135). In 1980 and the first quarter of 1981, for example, the country's foreign debt increased by 88% (J.A. 15-16, ¶ 6; 138). This large inflow of foreign funds contributed to significant inflationary pressures and was accompanied by an overvaluation of Argentina's currency.

To appreciate the nature of the Argentine Government's actions in this case, it is necessary to understand the importance of foreign exchange to countries such as Argentina, whose currency is not accepted in the international marketplace. When individuals or businesses in the United States

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2 Respondents claim to hold a total of nineteen Bonods with an aggregate face value of $1.33 million (J.A. 8-11, ¶¶ 14, 22, 29). A total of approximately $1.2 billion in Bonods were issued in connection with the foreign exchange insurance contracts that matured in 1982-83 (J.A. 17, ¶ 9).

seek to make purchases overseas for import to this country, they can make payment in their own currency because the U.S. dollar is accepted in the international marketplace as a medium of exchange. That is not true in Argentina, however, because Argentine currency is not accepted in cross-border transactions (J.A. 14, ¶ 4). Accordingly, in order for Argentine entities or individuals to acquire goods and services from other countries or fulfill lending obligations, they must obtain dollars or other internationally acceptable currencies. For this reason, foreign exchange policy is critical to maintaining a viable Argentine economy.

In order to deal with the financial crisis Argentina faced in the early 1980's, it was necessary for Banco Central and the Ministry of Economy to impose a series of stringent economic measures. These measures led to a rapid devaluation of the Argentine currency. In February 1981, for example, a 10% adjustment in the exchange rate was ordered (J.A. 16, ¶ 7; 76). At the same time, Banco Central also announced the exchange rates that would be in effect until August 1981, which imposed further adjustments at the rate of 3% monthly (J.A. 76). By March of 1981, it was necessary to impose yet another new system of controls, in which Banco Central set the official exchange rate on a daily basis (J.A. 16, ¶ 7; 76). In the month of June 1981 alone, Banco Central adjusted the official exchange rate by 30% (J.A. 16, ¶ 7). One profound effect of this instability in exchange rates was seriously to inhibit the granting and renewal of critical foreign loans to Argentine borrowers.

(c) The FEIC Program

In order to compensate for this tightening of necessary credit, in 1981 Banco Central began a foreign exchange insurance contract program (the "FEIC"). The program was designed to adjust for the problem confronting Argentine borrowers who, because of the rapid devaluation of the Argentine peso, would have to provide unknown and increasing amounts of additional pesos in order to buy the foreign

exchange necessary to meet their obligations when their loans matured (J.A. 16, ¶ 8).

Under the FEIC, the Argentine borrowers would pay to Banco Central a contractually defined amount of local currency, and would receive the necessary dollars to repay their foreign debt when it matured, regardless of intervening devaluations (J.A. 16, ¶ 8). While the normal credit risk thus remained between the domestic borrower and the foreign lender, the Argentine Government undertook to absorb the effects of devaluation. The Government's concern was that absent such a program, the risk of massive devaluation would severely restrict the influx of necessary foreign funds, because neither borrowers nor lenders would have adequate security as to how much local currency would be needed to purchase the foreign exchange required to repay loans.

By 1982 Argentina's economy had deteriorated further, and Argentine currency had suffered additional massive devaluations beyond even what had been anticipated just one year before (J.A. 17, ¶ 9; 116, 140). The pressures on the economy were intensified by the Republic's involvement in the war related to the Malvinas. By the Fall of 1982, the Argentine Government's foreign exchange reserves were wholly insufficient to meet its various foreign exchange obligations, including its obligation to provide the dollars due under the FEIC (J.A. 17, ¶ 9).

(b) The Rescheduling of FEIC Maturities

The Argentine Government determined in the Fall of 1982 that it would be necessary to adopt emergency measures in order to conserve the country's limited supply of foreign exchange. As one component of that program, it created financial instruments which it offered to satisfy its obligations to provide foreign exchange under the FEIC contracts. The Ministry of Economy directed Banco Central to issue Bonods, as well as other alternative financial instruments

(J.A. 29, 32).[3] Banco Central's Charter provides that the National Government bear the costs of such an undertaking (J.A. 67-68, Arts. 31, 33).[4] These Bonods were issued in Argentina and their terms were not negotiated (J.A. 17, ¶ 10).

To underscore the pervasive nature of Argentina's fiscal crisis at that time, in the Fall of 1982 the Government negotiated an emergency new financing and rescheduling program with the international financial community, which included loans from the IMF and the international lenders as well as the refinancing of loans from private banks and various governments (J.A. 18 n.3).

(c) The Bonods

The Bonods confirm on their face that they were issued as a component of the Argentine Government's program to regulate and stabilize its limited supply of foreign exchange. They provide that they are to be applied only to external debt that is subject to foreign exchange insurance agreements with Banco Central, and refer any holder, or potential holder, to

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3 Banco Central also was authorized to issue Bonods in guaranty of the private debt rather than in substitution (J.A. 37). In addition to introducing the Bonods as one form of instrumentation for Banco Central's servicing of the FEIC payments, Banco Central also created promissory notes. The Bonods should not be confused with these promissory notes that have been issued from time to time by Banco Central. The promissory notes, whose terms *were* extensively negotiated, were offered as an alternative to the Bonods (J.A. 17, ¶ 9; 81). Foreign creditors who chose to participate in these programs had the option of taking either the promissory notes or the Bonods (J.A. 111). Extremely detailed in their terms and purporting to address a number of legal and jurisdictional issues, the notes stand in stark contrast to the Bonods (J.A. 106).

4 Accordingly, in order to defray the cost to Banco Central of issuing and servicing the Bonods, the Ministry determined that its own accounts would be "debited to handle financial services and costs engendered by issuance of the securities," and provided that Banco Central could collect from those Treasury funds a so-called "commission" of 0.1% of the amount of the securities it issued (J.A. 35).

the relevant Banco Central regulations—*i.e.*, "Communications" A-31, 54, 61, and 76 (J.A. 14, ¶ 3).

The Bonods also make clear that they are issued by Banco Central "in its capacity as Financial Agent for the State" (J.A. 20). They provide for payment of principal and interest in United States Dollars, subject to and according to the provisions of Argentine Government Decrees 1334 and 1603, excerpts of which are reproduced on each Bonod.[5] Interest rates on the Bonods are linked to the London Interbank rate for Eurodollar deposits, and payment may be made in Frankfurt, London, Zurich or New York (J.A. 24).

The Bonods contain no language that submits to the jurisdiction of the United States courts (J.A. 20). Nor do they state, or imply in any way, that any law other than Argentine law will govern them.[6] Consequently, the Bonods do not contain *any* terms which waive, either explicitly or implicitly, Argentina's sovereign immunity to suit.

(d) The Rescheduling of Bonod Maturities

The foreign debt crisis, accompanied by the serious domestic economic problems which confronted Argentina and other countries, continued throughout the 1980's. In 1984-85, for example, the Argentine Government negotiated a program of massive new financial support and reschedulings with the international financial community, including the IMF, the United States, and other governments and private lending institutions (J.A. 18 n.3).

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5 These conditions for payment include, *inter alia*, restrictions on transfer and proper notice of transfer to Banco Central (J.A. 24).

6 While Banco Central was empowered to grant an extension of jurisdiction in the instruments it created (J.A 34, Art. 3(g) of Decree 1336), it did *not* do so with respect to the Bonods (*Compare* J.A. 20 *with* J.A. 108-09). This is no different than the power of the United States Government to waive its sovereign immunity, a power it, like the Argentine Government, exercises only in very limited and clearly-defined instances. *See, e.g.*, 28 U.S.C. § 1346 (1988).

Thus, when the Bonods began to mature on May 26, 1986, the Argentine Government still lacked sufficient foreign exchange to meet its obligations, including the retirement of the Bonods. As a result it was forced to implement an ordered system of allocating scarce foreign exchange (J.A. 18, ¶ 12; 116; 120). As it continued discussion with other sovereigns and with international organizations such as the IMF, the Republic determined that adjustment of capital maturity dates for the Bonods was necessary. A diplomatic note describing that decision was sent to the Secretary of the United States Treasury, James A. Baker, III, as part of the ongoing consultations between the two nations over this issue of mutual concern (J.A. 18, ¶ 12).

As one component of this program, the Ministry of Economy was empowered by the President of the Republic temporarily to extend amortizations of principal corresponding to Bonods, and to instruct Banco Central to promulgate the standards and the procedures necessary to do so (J.A. 118). The Ministry of Economy instructed Banco Central to implement the temporary extension of maturity dates; to include these instruments in the new program of general refinancing being undertaken by Banco Central; and to communicate the extension to the holders of the instruments (J.A. 17, ¶ 9; 120). This decision was jointly announced to holders of these instruments by the President of Banco Central and the Secretary of the Argentine Treasury (J.A. 123). A subsequent rescheduling, which was negotiated jointly by the Ministry of Economy and Banco Central with the international financial community, was implemented as part of the Republic's 1987 Financing Plan (J.A. 147).[7] Pursuant to this plan and the

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7 Included in this restructuring were $1.95 billion in new commercial bank loans to the Republic; restructuring of approximately $30 billion in existing public and private sector debt by commercial banks; agreements concerning trade and money market lines to Argentine entities; a debt-to-equity conversion program which allows for conversion of Argentine public debt into equity investments in Argentina; new loans from the IMF and World Bank; and the rescheduling of debts owed to other governments, including the United States (J.A. 18-19, ¶ 14). Plaintiffs are among the few holders of Bonods who declined to participate in this comprehensive refinancing program.

persistent economic exigencies that necessitated the rescheduling, the payments Respondents seek to compel continue to be prohibited by government policy (J.A. 18-19, ¶ 14).

SUMMARY OF THE ARGUMENT

The Foreign Sovereign Immunities Act of 1976 provides that foreign sovereigns are immune from the jurisdiction of United States courts unless a statutorily-defined exception to immunity applies. 28 U.S.C. § 1604. The "commercial activity" exception to immunity directs that a foreign state shall not enjoy immunity in a case which is based upon "commercial activity . . . or upon an act . . . in connection with a commercial activity," if the complained-of conduct has a specified nexus with this country. 28 U.S.C. § 1605(a)(2). The conduct of the Argentine Government—the issuance and rescheduling of debt instruments as a component of its regulation of Argentina's critical supply of foreign exchange—is sovereign, and not commercial, because it goes to the very heart of the Government's unique role in administering Argentina's economy. Nor does this lawsuit have a jurisdictionally-sufficient connection with this country, because the failure to pay Respondents, foreign corporations that have no connection with this country other than their requests to receive payment here, is insufficient to meet the nexus requirement of the Act.

The Act defines "commercial activity" in terms of the process by which it should be evaluated, and directs that the character of foreign state conduct be determined "by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Because the facts and circumstances attendant to the sovereign's actions give meaning to its conduct, the Act clearly contemplates that the conduct to be reviewed will be examined in context rather than in isolation. Sovereign issuance of debt is to be evaluated under the Act like any other sovereign conduct: based on the nature of the acts underlying its creation. Properly viewed in context, Peti-

tioners' conduct in issuing and rescheduling the instruments at issue is conduct unique to sovereigns, and thus is not commercial activity under the Act.

Petitioners' failure to pay the Respondent alien corporations in New York does not constitute the "direct effect" in this country required to support jurisdiction under the FSIA. Under the provision of the Act applicable to this case, jurisdiction is present only where foreign state conduct outside the United States causes a "direct effect" in this country. In this regard the FSIA is a long-arm statute crafted to place foreign sovereigns on an equal footing with private parties in terms of jurisdiction. It requires *substantial* contacts with the forum that are related to the cause of action before jurisdiction can be exercised. Petitioners' failure to pay money here to Respondents, who have no discernible presence in this country save their designation of New York as the place of payment, does not meet that requirement and is an insufficient basis for jurisdiction under the Act.

ARGUMENT

I. THE PROMULGATION AND RESCHEDULING OF THE BONODS BY THE ARGENTINE GOVERNMENT PETITIONERS WAS NOT COMMERCIAL ACTIVITY

The Foreign Sovereign Immunities Act of 1976,[8] provides the only basis for obtaining jurisdiction in this country over a foreign nation.[9] The Act directs that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States" unless certain defined exceptions are met. 28 U.S.C. § 1604. The jurisdiction-conferring provision of the FSIA provides that the district courts have jurisdiction only over those claims for which a foreign state defendant is not entitled to immunity under the substantive provisions of the Act. 28 U.S.C. § 1330(a). Accordingly, a

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8 Pub. L. No. 94-583, 90 Stat. 2891, *codified as* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

9 *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

foreign nation's immunity from suit in the United States is the rule; jurisdiction exists only where the nation's conduct falls within one of the defined exceptions contained in the FSIA.

The most frequently invoked FSIA jurisdictional predicate is the "commercial activity" exception to sovereign immunity. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 307 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). This provision provides that a foreign state shall not enjoy sovereign immunity in a case which is based upon "commercial activity . . . or upon an act . . . in connection with a commercial activity," if the complained-of conduct has a specified nexus with this country. 28 U.S.C. § 1605(a)(2). The nexus requirement is discussed in Part II of this brief. In each instance, jurisdiction can be present, and the nexus requirement comes into play, *only if* the lawsuit is based upon conduct of the foreign sovereign that is deemed "commercial."

The Second Circuit concluded that the Petitioners' relevant actions were commercial, and not sovereign. It did so despite the fact that this action is based upon the issuance of financial instruments in Buenos Aires, by Banco Central as financial agent for the Republic, in fulfillment of the Government's own obligation under a plainly sovereign program involving the regulation of the nation's limited supply of foreign exchange. The circuit court reached its decision by beginning and ending its analysis with the fact that what was at issue was the issuance of a debt instrument. In so doing, the court erred in two related respects.

First, the circuit court erred in applying what amounts to a *per se* rule that the issuance of debt is commercial activity (Pet. App. A at 9a-10a). No such rule is contained in, or contemplated by, the FSIA. Second, the court erred in artificially separating Petitioners' acts from their context, and examining them in clinical isolation devoid of any meaningful background. As set forth below, in directing that the character of the foreign state's conduct be determined by reference

to its nature,[10] the FSIA requires that the acts in issue be evaluated in their factual context. That analysis, properly applied, compels the conclusion that Petitioners' conduct is not commercial, but sovereign activity.

A. There Is No *Per Se* Rule That Issuance Of Debt Is Commercial Activity

The plain language of the FSIA contains no provision which addresses foreign state issuance of debt, and the Act's legislative history confirms that there is no *per se* rule that all debt instruments are commercial. Instead, there was uncertainty in Congress as to whether there should be a *per se* rule *in favor* of immunity with respect to claims based on a foreign sovereign's debt. The bill that became the FSIA, as introduced on recommendation of the Departments of State and Justice, contained a provision, Section 1606, titled "Claims involving the public debt," which would have conferred immunity on all debt "incurred for general governmental purposes." H.R. 11315, 94th Cong., 2d Sess. (1976).[11] The provision was dropped before the bill became law in 1976.

In explaining the decision not to enact a *per se* rule in favor of sovereign immunity with respect to suits based on a foreign sovereign's debt, the House Judiciary Committee identified those situations in which jurisdiction over a foreign sovereign sued over public debt would be appropriate. First, the committee observed that "an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private

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10 *See* 28 U.S.C. § 1603(d).

11 This proposed provision read, in pertinent part, as follows:

> (b) Notwithstanding the provisions of section 1605 of this chapter, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to debt obligations incurred for general governmental purposes . . . .

H. R. 11315 (proposed § 1606).

The provision indicated that it would not apply where the foreign state has waived its immunity explicitly or the case arises under provisions of United States securities laws. *Id.*

or public lending institution located in the United States" would be included within the scope of Section 1605(a)(2), the commercial activity section of the Act. House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615-16 [hereinafter *House Report*]. Clearly neither of those scenarios is present here. In addition, the Committee thought that:

> In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument.

House Report, *supra*, at 10. The Bonods, of course, contain no such waiver. Thus, this case includes none of the elements identified by Congress as warranting an exception to immunity where a foreign state is sued based on the issuance of debt. The legislative history demonstrates that Congress believed that under the Act, foreign sovereign debt would be treated as any other sovereign conduct: evaluated on the nature of the acts underlying its issuance.

The pre-FSIA law confirms that in adopting the FSIA, Congress was not enacting a *per se* rule with respect to debt. The FSIA standard for classifying foreign state conduct as sovereign, and therefore immune from jurisdiction, is derived from the pre-statute practice of applying the so-called "restrictive" theory of sovereign immunity. Under this doctrine, foreign states are deemed immune from the jurisdiction of the courts of this country with respect to their "public" acts, and are denied immunity only with respect to their "private" or commercial acts. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't. of State Bull. 984 (1952).

The leading pre-FSIA case makes clear that public debt never was treated as *per se* commercial conduct. *Victory Transport, Inc.* v. *Comisaria Gen. de Abastecimientos y*

Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In fact just the opposite was true. As the court in *Victory Transport* noted:

> [W]e are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. Such acts are generally limited to the following categories:
>
> (1) internal administrative acts, such as expulsion of an alien.
>
> (2) legislative acts, such as nationalization.
>
> (3) acts concerning the armed forces.
>
> (4) acts concerning diplomatic activity.
>
> (5) *public loans.*

336 F.2d at 360 (emphasis added). While not every principle articulated in the *Victory Transport* decision remains the law today,[12] it is significant that under pre-FSIA practice, "public loans" were deemed to be sovereign.

The statute and its history are thus devoid of support for the Second Circuit's view that the Act embraces a *per se* rule denying immunity in suits based upon public debt. Rather, Congress expressly rejected the notion that there could be a precise definition of "commercial activity," and put " '[i]ts faith in the U.S. courts to work out progressively on a case-by-case basis . . . the distinction between commercial and governmental.' " *Texas Trading*, 647 F.2d at 309 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Adminis-*

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12 For example, the court in *Victory Transport* wrestled with and ultimately rejected the distinction between "nature" and "purpose" of the transaction giving rise to the claim, 336 F.2d at 359-60, while the FSIA makes that distinction explicitly in § 1603(d).

trative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 53 (1976) [hereinafter *House Hearings*] (testimony of Monroe Leigh, Legal Adviser, Department of State)). Indeed, the difficulty in defining sovereign conduct has led this Court to recognize that it is rarely possible to adopt immutable principles in this area. *See, e.g., Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting as unworkable "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' "); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955) (rejecting the "uniquely governmental function" test in the area of government tort liability); *New York* v. *United States*, 326 U.S. 572, 583 (1946) (concluding that a rule of state immunity from federal taxation cannot be based upon "such untenable criteria" as "historically sanctioned activities of government").

Proper analysis of foreign government conduct under the Act requires at minimum that the foreign state's actions be viewed in context, in the light of the attendant facts and circumstances. In this case, the resulting picture is one of wholly sovereign conduct.

B. The FSIA Requires That The Sovereign's Conduct Be Analyzed In Context In Order Properly To Determine Its Nature

The first step in the FSIA commercial activity analysis is to properly identify the conduct that is relevant to the court's inquiry. *See, e.g., Texas Trading*, 647 F.2d at 308. This has proven to be no easy task,[13] yet more often than not it is dispositive of the commercial activity question. *See International Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354, 1357 (9th Cir. 1981) ("immunity question may be determined by how broadly or narrowly [t]he activity is defined"), *cert. denied*, 454 U.S. 1163 (1982). That is because—as in this case—the

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13 *See, e.g., Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987) (noting that difficulty in applying commercial activity exception "has resulted in differing approaches on the parts of different courts").

lens through which the court views the foreign state conduct before it inevitably affects its legal characterization of the activity under review.

1. The context in which the foreign state's conduct occurs gives meaning to its nature

The FSIA defines "commercial activity" in terms of the process by which foreign state conduct should be evaluated. Specifically, the statute provides that

> [t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The Act thus explicitly contemplates that the conduct under review will *not* be examined in isolation. Rather, the Act directs that courts analyze not only a "transaction" or an "act" by the foreign sovereign, but the "nature of the course of conduct." *See* 28 U.S.C. § 1603(d). The legislative history of the Act, too, makes it clear that the drafters intended and expected that the courts would consider "the course of conduct during the transaction—what does occur rather than the end result." *House Hearings*, *supra*, at 53. The circuit court ignored this clear language.

While some courts, including the court of appeals here, have voiced concern that if the lens is too broad it will inevitably involve some consideration of the sovereign's "purpose," it is equally true that a lens that is too narrow will obscure facts necessary to accurately analyze the nature of the activity at issue. Moreover, this case well illustrates that viewing the sovereign's relevant course of conduct—here including the nature of the origin of the debt in issue—need not and does not implicate any consideration of the sovereign's motives or intent, but focuses strictly on the relevant facts and events which give meaning to its actions.

The need to consider the facts and circumstances attendant to the foreign state's conduct is well illustrated by comparing

this case with the analysis applied by the Fifth Circuit in *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). There, as here, the discrete acts at issue were a foreign state's issuance of, and failure to honor, a promise to pay money. The Fifth Circuit, however, concluded that this conduct was sovereign, and not commercial, after evaluating it in conjunction with the attendant circumstances.[14] As the *De Sanchez* court explained, identical actions often may be properly characterized in different ways depending upon the context.[15] The act of issuing a check, for example, may be a simple and routine commercial sale of foreign currency, or "regulation and supervision of a nation's foreign exchange reserves," a quintessential sovereign act. 770 F.2d at 1392-93. Whether or not the Fifth Circuit was correct on the facts, its analysis is instructive. The Seventh Circuit also has recognized that the *De Sanchez* court's consideration of the context for the government's actions, including the government's role in conserving scarce foreign exchange at a time of national crisis, was necessary to comprehend the nature of the relevant foreign state conduct. *See Rush-Presbyterian-St.*

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14 The Fifth Circuit noted, *inter alia*, that the Nicaraguan Central Bank "became involved with [the plaintiff] only in its official role of regulating the sale of foreign exchange," and the government's "only authorized purpose in issuing [the obligation] was to maintain stable exchange rates and to allocate scarce foreign exchange reserves." *De Sanchez*, 770 F.2d at 1393. This case presents significantly more compelling facts than those in *De Sanchez*, but the Circuit Court believed, incorrectly, that it was precluded from considering those facts.

15 The *De Sanchez* court aptly noted:

> [W]e do not believe that an absolute separation is always possible between the ontology and the technology of an act. Often, the essence of an act is defined by its purpose . . . Unless we can inquire into the purposes of such acts, we cannot determine their nature.
>
> . . . .
>
> Banco Central was not merely engaging in the same activity as private banks with a different purpose; in a basic sense, it was engaging in a different activity. It was performing one of its intrinsically governmental functions as the Nicaraguan Central Bank.

770 F.2d at 1393.

Luke's Medical Ctr. v. *Hellenic Republic*, 877 F.2d 574, 578-79 n.5 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989).

The approach of these opinions is equally applicable to this case. The circuit court viewed Petitioners' acts through an artificially narrow lens, and barred relevant facts from its inquiry, because it erroneously believed it was required to "isolate" the specific acts complained of by Respondents, rather than evaluate them in the context in which they took place (Pet. App. A at 8a). To do otherwise, the court concluded, would be to define the conduct "overbroadly," with the result that the government conduct at issue "would almost inevitably be characterized as sovereign in nature." *Id.* What the Second Circuit failed to recognize, however, is that the converse also is true: if a court insists on surgically removing foreign government acts from their context, and examining them microscopically in the absence of any meaningful background, they will almost inevitably appear to be identical to conduct engaged in by private actors.

This does not mean that every act of a foreign government must be viewed as part of a long flow of events and actions originating with some perceived public need. To require this would inevitably lead to consideration of the purposes of the Governmental action. Rather, it means that what must be analyzed is the nature of the course of conduct immediately relevant to the particular act at issue. In the context of debt, this requires, at a minimum, examination of the nature of the conduct underlying the creation of the debt. Any other result would not only be inconsistent with the express language of the statute, but would engraft onto the statute a *per se* rule that all debt is commercial.

2. Petitioners' relevant actions constitute sovereign conduct

Properly viewed in context, Petitioners' acts are clearly sovereign. The legislative history of the Act suggests that courts should "inquire whether the activity in question is one which private persons ordinarily perform or whether it is

peculiarly within the realm of governments." *House Hearings*, *supra*, at 53. Congress articulated its concern that there be a mechanism for legal recourse against foreign nations as their governments increasingly entered the marketplace to do business with United States citizens. *House Report*, *supra*, at 16. The FSIA's drafters correctly anticipated that some number of "ordinary legal disputes" inevitably would result from such instances, which they envisioned would include situations where

> U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention.

House Report, *supra*, at 6-7. Congress thus intended that foreign states be subject to jurisdiction in United States courts for their contract dealings, but only where those contracts were "of the same character as a contract which might be made by a private person." *House Report*, *supra*, at 16.

While some cases present close questions, others are easy to resolve. Contracts to sell goods, *see*, *e.g.*, *Crimson Semiconductor, Inc.* v. *Electronum*, 629 F. Supp. 903 (S.D.N.Y. 1986), and contracts to buy them, *see*, *e.g.*, *Texas Trading*, 647 F.2d 300, fall into the latter category. Other types of government conduct, which have unique sovereign attributes but are in some way similar to private conduct, may be more problematic. *See*, *e.g.*, *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), *cert. denied*, 474 U.S. 995 (1985).[16] The government conduct at issue in this case, in

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16 In *Arango*, the plaintiffs brought breach of contract, negligence, battery, and false imprisonment claims against the Dominican national airline after they were denied entry as vacationers into the Dominican Republic. The court held that the airline was not entitled to sovereign immunity on the breach of contract and tort claims, even though, in breaching the tour contract, it was complying with the government's sovereign decision to exclude the plaintiffs. 621 F.2d at 1379-80. The airline *was* found entitled to sovereign immunity on the battery and false imprisonment claims, where it had acted "as an arm or agent of the Dominican government." *Id.* at 1379.

contrast, cannot be construed as activity which might be undertaken by a private person in any respect: it is quintessentially sovereign.[17]

Even under the circuit court's analysis, Petitioners' conduct in issuing the Bonods was sovereign, and not commercial, because, unlike transactions in which private parties engage, Petitioners agreed to become obligated for debt, but received consideration in no way commensurate with its value.[18] Even in that sense, Petitioners engaged in conduct that no private individual ever would contemplate, let alone "ordinarily perform." When viewed in context, the conclusion that Petitioners' conduct was sovereign is even clearer.

The Court recognized more than 150 years ago that there is a clear and central role for the sovereign in the regulation of currency and other functions relating to the finances of the State. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 324

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17 The Court, like Congress, has recognized that there is a "line between the State as government and the State as trader," and that the line is crossed where a government entity "enters the market place seeking customers," *New York* v. *United States*, 326 U.S. 572, 579 (1946). At the other end of the spectrum, it also has recognized that when the State acts in certain contexts and in certain limited roles, it will be engaged by definition in a uniquely governmental function. *See United States* v. *Johnson*, 481 U.S. 681 (1987) (finding the relationship of the government to its armed forces to be distinctly federal). Thus, while buying boots for the army places the State in the marketplace as a trader, *Texas Trading*, 647 F.2d at 309, promulgating regulations as to when and where to wear them presumably does not. These are the easy cases. The same should be true for this case, where the Argentine Government Petitioners did not enter the marketplace in any sense, but rather acted in their sovereign role to regulate Argentina's limited supply of foreign exchange.

18 The district court, straining to find a commercial connection, seized upon the 0.1% reimbursement—the so-called "commission"—which Banco Central received from the national treasury (J.A. 35). As is clear in the record, however, that "fee" was paid to Banco Central by the Republic, and thus by definition there could be no net gain to Petitioners. What was involved was simply an accounting within the Government, for costs being incurred by one Government agency for acts it was taking on behalf of the other (J.A. 32). The Second Circuit "express[ed] no view" on the district court's conclusion (Pet. App. A at 8a n.1).

(1819). There are few activities more peculiarly within the province of government than the administration of a nation's money supply and the promulgation of attendant regulations and laws. Moreover, in this case the government acted in the midst of an acute monetary crisis which threatened the viability of the Argentine nation's economy. Surely conduct for "the purpose of saving its national economy from the brink of monetary disaster . . . represents the 'exercise [of] powers peculiar to sovereigns.' " *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (quoting *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 704 (1976)). Accordingly, a nation's promulgation of foreign exchange regulations, especially in response to economic crisis, has properly been held to be " 'precisely the type of governmental activity that cannot be subjected to judicial scrutiny.' " *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1108 (5th Cir. 1985) (quoting *Braka*); *see also De Sanchez*, 770 F.2d at 1392-93.[19]

The circuit court, however, declined to examine Petitioners' issuance of the Bonods, or the rescheduling, as other than isolated acts. Indeed, after discussing it (Pet. App. A at 2a-4a), the court expressly declined to consider Petitioners' course of conduct in its evaluation of their discrete acts (Pet. App. A at 10a). Accordingly, the Second Circuit's analysis ignored a number of facts important to an understanding of the true nature of Petitioners' conduct.

First, the court below dismissed the fact that the Bonods were created by the Argentine Government to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of

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19 Those decisions were clearly correct in light of the economic and political realities of the modern world, which dictate a like result in this case. *See, e.g.*, Marcelo Selowsky, *Stages in the Recovery of Latin America's Growth*, Finance & Development, June 1990, at 28 (discussing complementary relationship between domestic economic policies and external financing); *Debt Crisis Dominates Economic and Social Council Debate*, U.N. Chronicle, December 1989, at 64 (discussing "impact of 1980's debt crisis on the world economy").

foreign exchange. It thus ignored that the Bonods (a) raised no capital; and (b) were not the mechanism for financing trade or acquisitions by a government entity. It likewise ignored that the Petitioners issued the Bonods without receiving consideration commensurate with their value in any customary sense.

These facts, however, give meaning to the nature of the conduct at issue. Without them, the court below had before it only the end result of Petitioners' actions, which Congress has told us and logic confirms is too narrow a snapshot to permit the true picture of Petitioners' conduct to emerge. Viewed in context as the Act directs, Petitioners' conduct clearly was sovereign. For that reason, the decision of the court of appeals should be reversed.

II. THE FAILURE TO PAY FOREIGN CORPORATIONS IN NEW YORK IS NOT A "DIRECT EFFECT" IN THE UNITED STATES SUFFICIENT TO SUPPORT JURISDICTION UNDER THE ACT

The FSIA provides that even where a foreign state has engaged in commercial activity, the sovereign's relevant acts must have a sufficient nexus with the United States in order to support jurisdiction. *See Stena Rederi AB* v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 386 (5th Cir. 1991); *America West Airlines, Inc.* v. *GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989). Specifically, the Act provides for jurisdiction where:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or *upon an act outside the territory of the United States* in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*

28 U.S.C. § 1605(a)(2) (emphasis added).

The Act thereby provides a template for measuring when foreign state conduct is within the jurisdiction of the court, based in part on the strength of the relationship between the lawsuit and this country. The nexus categories begin with the situation in which the action is based upon the sovereign defendant's broad presence here (the first clause); include the situation where the foreign state has actually come into this country and committed the complained-of act here (the second clause); and end with the direct effect provision at issue in this case (the third clause), which reaches actions based upon foreign state conduct outside this country, but only if it causes a direct effect here.

The courts below found, and the Respondents concede, that this lawsuit has but a single connection with this country: the alleged nonreceipt of payment by wholly foreign corporations in bank accounts located in New York City, after earlier payments had been made to those accounts, under an instrument whose only reference to the United States was to list New York as one of four possible places of payment. Relying on this lone contact, the court of appeals divined a "direct" effect from the perceived need to protect New York's role as an international payments center.

This contact, without more, is insufficient to meet the nexus requirement imposed by the Act. As discussed below, this is the clear result if one looks to the plain meaning of the statute (Section A), to the expressed intent of Congress that jurisdiction be based only upon the foreign state's contacts with the forum that are related to the cause of action (Section B), to the drafter's direction that any jurisdictional effect in this country must be substantial (Section C), and to Congress's intent that foreign sovereigns be placed on an equal footing with private parties under traditional principles of "long arm" jurisdiction (Section D). Finally, as also is discussed below, it is clear that any broader reading of the nexus requirements of the Act would exceed the Constitution's due process limits (Section E).

A. The Language Of The Act Requires Something More Than A General Effect In This Country Before Jurisdiction Can Be Exercised

The provision of the Act applicable to this case provides that subject matter jurisdiction is present only where the action is based upon:

> an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and *that* act causes a *direct effect* in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added). The starting point for discussion is that this language means what it says—the effect must be *direct*, and it must flow from the specific act at issue. Any other type of effect simply will not do. Were *any* effect here to suffice, we can presume that Congress would have drafted the statute to say so.[20]

While courts have found a direct effect in the United States when a United States corporation suffers financial loss here as a result of a sovereign's commercial activity, *see, e.g.*, *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Crimson Semiconductor, Inc.* v. *Electronum*, 629 F. Supp. 903, 907 (S.D.N.Y. 1986); *Exchange Nat'l Bank* v. *Empresa Minera Del Centro Del Peru S.A.*, 595 F. Supp. 502, 505 (S.D.N.Y. 1984). It is difficult to conceive how the economic loss suffered by *non*-United States residents, whose

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20 Congress did just that with respect to a different section of the FSIA, the tortious conduct exception to sovereign immunity, which provides for jurisdiction over cases where money damages are sought for personal injury, death or damage to or loss of property occurring in the United States. Under that provision, which simply speaks in terms of "damage" or "loss" in the United States, it appears that *any* harm in this country does suffice to authorize jurisdiction. 28 U.S.C. § 1605(a)(5). It is not surprising that an effect of any magnitude, however small, apparently will provide an adequate predicate for jurisdiction under this section, because, in contrast to the commercial activity provision, the tortious activity exception applies only where both the effect *and* the complained-of act take place in this country. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

only contact with the United States is their choice to collect here a payment contracted for elsewhere, can ever be considered a jurisdictionally-sufficient direct effect.

The Second Circuit recognized this problem. It chose, however, not to focus on the effect of the Petitioners' actions on the Respondents. Instead, it rested its finding of a sufficient jurisdictional nexus on a public policy concern that the courts "preserve . . . New York's status as a world financial leader" (Pet. App. A at 13a). In so doing, it reiterated the concern it had articulated earlier in its act of state discussion in *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-522 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). The potential impact of refusing to extend jurisdiction to this case, the circuit court reasoned, might affect New York's position as a respected clearinghouse of United States dollars, thus justifying the conclusion that jurisdiction was proper (Pet. App. A at 14a).

A policy concern such as that expressed in *Allied Bank*, however, which might be relevant in the context of an act of state analysis, hardly is relevant to the jurisdictional requirements of the Act.[21] An act of state analysis weighs the respective interests of the United States and the foreign government only *after* the court concludes that it has jurisdiction over the case pursuant to the FSIA. Reliance on such policy considerations may be appropriate in applying this judicially created doctrine. And, there may be—although we doubt it[22]—*an* effect in the United States should sovereigns regularly refuse to make payments payable in New York. This kind of policy-based analysis, however, provides neither the necessary predictability for sovereigns that is contemplated by the Act, nor

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21 In *Allied Bank* there was no necessity for a jurisdictional analysis because, as the court noted, at the foreign defendants "conceded jurisdiction in New York." 757 F.2d at 521.

22 *See Verlinden B. V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

the *direct* effect of the sovereign's act mandated by the statute.

B. The FSIA Provides For Jurisdiction Based Only Upon A Foreign State's Contacts With The Forum That Are Related To The Cause Of Action

The nature of the effect required to support jurisdiction is defined by the statute, and on this point the legislative history of the FSIA is fully consistent with the express language of Section 1605(a)(2). Both make it clear that the Act extends jurisdiction only to actions which are based upon substantial forum contacts of the foreign state, and considers only those forum contacts that are related to the cause of action. The Report of the House Judiciary Committee expressly states that in this respect the Act was patterned after the long-arm statute enacted by Congress for the District of Columbia. *See House Report*, *supra*, at 13.[23] The District of Columbia model rests jurisdiction only upon foreign defendants' contacts with the District that are related to the cause of action sued upon; like the FSIA, it does not purport to reach a defendant simply as a result of his overall contacts with the forum. *See* 13 D.C. Code § 13-423 (1973); *see also Harris* v. *Vao Intourist, Moscow*, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979).[24]

Testimony before the subcommittee which drafted the bill indicates that this structure was chosen carefully, and for good reason. As Bruno A. Ristau, then Chief of the Foreign

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23 Specifically, the Report indicates that the Act was patterned after Public Law No. 91-358, sec. 132(a), tit. I, 84 Stat. 549.

24 The District of Columbia long-arm statute, in turn, was modeled after and provides for substantially the same bases of jurisdiction as the comparable laws of Maryland and Virginia and the Uniform Interstate and International Procedure Act. *See* H.R. Rep. No. 907, 91st Cong., 2d Sess. 61 (1970). Each of these statutes also eschews general jurisdiction over a foreign defendant, and limits the jurisdictional analysis to forum contacts related to the lawsuit. MD. CTS. & JUD. PROC. CODE ANN. § 6-103 (1989); VA. CODE ANN. § 8.01 - 328.1 (Michie 1984); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03, 13 U.L.A. 361 (1986).

Litigation Section of the Civil Division, Department of Justice, explained:

> [T]he long-arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small "international courts of claims." The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.

House Hearings, *supra*, at 31.

All of the foregoing confirms that only those contacts which relate to the cause of action may form the basis of a United States court's assertion of jurisdiction over a foreign sovereign. Here those contacts are limited to the Petitioners' failure to pay money to the Respondents in the United States—a wholly insufficient basis upon which to rest jurisdiction under the Act.

C. Nonpayment Of A Debt To Foreign Plaintiffs Is Not A Substantial Forum Contact On Which FSIA Jurisdiction Can Rest

Congress clearly intended that the Act incorporate the test set forth in Section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) [hereinafter *Restatement (Second) of Foreign Relations Law*], which requires any jurisdictional "effect" in this country to be substantial as well as foreseeable. The House Report which recommended passage of the Act stated that the direct effect requirement was crafted to embrace commercial conduct having effects in the United States which would be subject to jurisdiction consistent with the principles set forth in Section 18. *House Report*, *supra*, at 19. This provision, in turn, limits a state's jurisdiction to extend it's law to conduct which occurs outside the country to instances in which the effect

within the territory is substantial.[25] The court of appeals apparently recognized that the "loss" suffered here by these foreign corporations, whose only connection with the United States was the maintenance of bank accounts, would not constitute a substantial effect in the United States under any reading of the conduct at issue. It simply, therefore, rejected the substantiality requirement as being irrelevant.

In stark contrast to the Second Circuit, the majority of circuit courts that have grappled with the direct effect issue have embraced the requirement that there be a substantial effect in the United States in order to assert jurisdiction under this provision of the FSIA. *See, e.g., America West Airlines*, 877 F.2d at 799; *Zernicek* v. *Brown & Root, Inc.*, 826 F.2d 415, 417-18 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Maritime Int'l Nominees Estab.* v. *Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983); *Ohntrup* v. *Firearms Ctr., Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985); *see also Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) (stating that the "effects of a foreign state's actions must be 'substantial' and 'direct and foreseeable' "), *cert. denied*, 493 U.S. 937 (1989).

Under this standard, it is clear that jurisdiction is not present in this case, because, as has been aptly noted, each Respondent corporation "[u]nlike a natural person . . . can only suffer financial loss." *Texas Trading*, 647 F.2d at 312. The Second Circuit in this case never explained how an entity incorporated and domiciled elsewhere can suffer a direct *or* substantial financial loss here, where the Respondents are foreign corporate entities with no presence in this country,

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25 The provision reads in relevant part as follows:

> The effect within the territory *is substantial*; . . . it occurs as a *direct and foreseeable* result of the conduct outside the territory; and . . . the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Restatement (Second) of Foreign Relations Law § 18 (1965) (emphasis added).

and they allege nothing more than nonreceipt of payment in New York maildrop bank accounts.

Finally, analyses utilized to determine whether subject matter jurisdiction exists over foreign violations of federal securities law parallel the Act's nexus test, and they, too, confirm that any United States effect in this case cannot be considered substantial for jurisdictional purposes. In considering whether conduct occurring outside the United States may be subject to the securities statutes, courts have required either related conduct in this country or a *substantial effect* in the United States. *See, e.g., Tamari* v. *Bache & Co. S.A.L.*, 730 F.2d 1103, 1106 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984);[26] *Restatement (Third) of the Foreign Relations Law of the United States* § 416(2) (1987). Courts that have applied this "effects" test have done so based on section 18 of the *Restatement (Second) of Foreign Relations Law*. *See Tamari*, 730 F.2d at 1107 n.6; *Continental Grain Pty., Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 417 n.12 (8th Cir. 1979). In applying this test courts have also concluded that a general effect on the American economy or American investors will not suffice: the requisite effect must also be on a *particular* United States plaintiff, or *particular* United States security. *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir.), *cert. denied sub nom. Bersch* v. *Arthur Andersen & Co.*, 423 U.S. 1018 (1975).

Examination of Section 18 of the *Restatement (Second) of Foreign Relations Law* thus leads to precisely the same result as application of the precise statutory language: to satisfy the fundamental requirement of the Act, the effect in the United States must be direct. Any perceived theoretical concerns about New York's role as an international payments center do not suffice. Congress did not design the FSIA to "open up our courts to all comers," or to permit our courts to adjudicate every controversy that might have any conceivable

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26 *See also, e.g., Continental Grain Pty., Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 416-17 (8th Cir. 1979); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206-09 (2d Cir.) *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969).

consequence within our borders. The Second Circuit's jurisdictional analysis, however, would do just that.

D. Congress Intended To Place Foreign Sovereigns On An Equal Footing With Private Parties In Terms Of Jurisdiction

Beyond this threshold analysis, it is clear that in enacting the FSIA Congress sought to place foreign sovereign governments and instrumentalities on an equal footing, as defendants, with private parties under traditional principles of "long arm jurisdiction." *See, e.g., House Hearings, supra,* at 31, 36 (testimony of Bruno A. Ristau). *See also Texas Trading,* 647 F.2d at 313; *Restatement (Third) of the Foreign Relations Law of the United States* § 453 cmt. c (1987) ("A court in the United States will not adjudicate a claim against a foreign state (or state instrumentality) that would not be subject to adjudication if the defendant were a foreign non-governmental enterprise."). It is accordingly pertinent—and indeed required—in construing the direct effect, long-arm clause in this case, to look at how similar claims are dealt with in cases involving non-sovereign parties.

The paradigm case is one in which a borrower, without leaving its own state, enters into a transaction with a lender from another state, payable at the lender's place of business, and the lender subsequently attempts to sue the borrower in the state of lender's place of business.[27] As summarized in the leading work on jurisdiction of courts in the United States, Robert C. Casad, *Jurisdiction in Civil Actions,* § 8.02 (2d ed. 1991), when a note is executed outside the forum state but payable in the forum state, the prevailing view is that long-arm jurisdiction is present over the maker of the note only when the underlying transaction also had a significant forum

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27 This statement of the paradigm case is significantly more favorable to the exercise of jurisdiction than the case before the Court, because here the holders of the Bonods seek to bring suit not at their place of business, but at an optional place of payment with which they have no other connection. The analogy also is more favorable to the Respondents than the case before the Court because, as discussed earlier, Petitioners did not "borrow" money.

state connection.[28] When the note is executed outside the forum state and the transaction had no significant connection to the forum state, the prevailing view has been that the fact that the note is payable in the forum state, without more, is not sufficient to support long-arm jurisdiction over the maker.[29]

A great number of decisions, by both state and federal courts, support these conclusions.[30] The courts so hold whether the defendant was domiciled or established in a state of the United States other than the putative forum or in a foreign country. For instance, in *Floyd J. Harkness Co.* v. *Amezcua*, 60 Cal. App. 3d 687, 131 Cal. Rptr. 667 (5th Dist. 1976), plaintiff had advanced funds from California to defendant against promissory notes issued in Mexico. When defendant failed to pay the notes as they came due, plaintiff brought suit in California, serving defendant in Mexico. Both the superior court and the court of appeal denied jurisdiction. The court of appeal listed three contacts: (1) plaintiff's acts of advancing funds from California; (2) the designation of California as the place of payment; and (3) numerous telephone conversations with defendant to and from California. "To predicate jurisdiction on contacts as tenuous as those here," the court of appeal said, "would not only offend traditional notions of fair play and substantial justice but would be unreasonable." 60 Cal. App. at 691, 131 Cal. Rptr. at 669.[31]

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28 *See, e.g., Schwegmann Bank & Trust Co.* v. *Simmons*, 880 F.2d 838 (5th Cir. 1989); *First City Fed. Sav. Bank* v. *Dennis*, 680 F. Supp. 579 (S.D.N.Y. 1988); *National Credit Union Admin. Bd.* v. *Christenson*, 627 F. Supp. 381 (E.D. Mo. 1986) (all containing numerous transaction-related contacts with the forum in addition to note payable to forum resident).

29 *See, e.g., Plaza Realty Investors* v. *Bailey*, 484 F. Supp. 335 (S.D.N.Y. 1979); *Fourth Northwestern Nat'l Bank* v. *Hilson Indus., Inc.*, 117 N.W.2d 732 (Minn. 1962); *Buck* v. *Heavner*, 377 S.E.2d 75 (N.C. App. 1989).

30 *See* Casad, *supra*, § 8.02 at 8-38 n.98.

31 Note that in the present case, only the second of the three contacts listed is present.

Again, in *Atlantic Fin. Fed.* v. *Bruno*, 698 F. Supp. 568 (E.D. Pa. 1988), defendants, residents of Alaska, agreed in Alaska to invest in an energy project in California. The promoters of the project agreed to arrange for financing, and arranged for a loan to defendants from a Pennsylvania bank. Defendants executed a note providing for payments at the bank's office near Philadelphia, and for a time they made payments to that office. When the project failed, defendants stopped paying on their note. The bank brought suit in Pennsylvania, and the court dismissed. "The mere entering into a contract by a party in Alaska with a bank in Pennsylvania," the court wrote, "does not constitute sufficient contacts to establish personal jurisdiction." 698 F. Supp. at 572.

To cite only one more out of a long line of cases, in *Glass* v. *Harris*, 687 F. Supp. 906 (S.D.N.Y. 1988), defendants, residents of Louisiana, executed a note in favor of plaintiff, a resident of New York, payable in New York on demand. The underlying transaction concerned real estate in Louisiana, but in fact the operative check had been delivered in New York. Eventually the transaction fell through, and plaintiff brought suit in New York. The court dismissed the action for want of jurisdiction:

> [Plaintiff] relies on . . . cases in which courts from this Circuit have found personal jurisdiction over defendants who had executed promissory notes outside New York that were payable in New York. However, . . . in each of these cases the court relied upon significant additional contacts between the defendant and New York to overcome the general rule that a promissory note made payable in New York cannot alone subject the borrower to personal jurisdiction in New York.

687 F. Supp. at 908-09 (citations omitted). In both *Atlantic* and *Glass*, unlike this case, both the place of payment *and* the plaintiff were located in the forum, yet the forum con-

tacts still were insufficient to support jurisdiction over the foreign defendants.[32]

Professor Casad summarized the relevant legal principles as follows:

> In actions arising from loan transactions, whether the defendant is the borrower, the lender, or a loan broker, the questions that appear to be the most significant in determining whether long-arm jurisdiction is proper are (1) whether the defendant physically entered the forum state in the process of forming the transaction; (2) whether the loan was designed to finance a project with significant forum state connection; (3) whether the loan was secured by property in the forum state; (4) where the loan was delivered to the borrower; and (5) where the payments were to be made. The cases in which long-arm jurisdiction has been upheld usually involve a combination of these factors, so it is not possible to conclude that any one of them alone would be sufficient.

Casad, *supra*, at § 8.03.

If one were to treat the Bonods as loan transactions, applying these tests, factors (1), (2), (3), and (4) are clearly absent. Factor (5) is present, as one of four options for the holder, not accompanied by any forum selection or choice of law clause. Casad lists no case, however, in which factor (5) standing alone—the place of payment of a debt—supported jurisdiction of the forum state.

E. Extension Of The FSIA To Reach Petitioners' Conduct In This Case Would Exceed Constitutional Due Process Limits

That the Act does not reach Petitioners' conduct in this case is clear not only from the language of the statute and the legislative history, but for another reason as well: were

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32 It also is significant that in each of the cases analyzed by Casad in which place of payment plus one or more of the other listed factors supported jurisdiction, the plaintiff also was a resident of the forum state.

the Act construed to extend jurisdiction to Petitioners' conduct at issue here, it clearly would run afoul of the due process limits of the Constitution.[33] Indeed, in their discussion of jurisdiction under the Act, the drafters of the FSIA expressly incorporated constitutional due process concerns, and specifically referenced the Court's precedent in this area. *See House Report*, *supra*, at 13 ("The requirements of minimum jurisdictional contacts and adequate notice are embodied" in the Act) (citing *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Fifty years of the Court's jurisprudence in this area confirms that in this case Petitioners' relevant contacts with the forum are too insubstantial to survive constitutional scrutiny as a jurisdictional predicate, and thus Congress could not have intended them to satisfy the "direct effect" requirement of the FSIA.

In order for a court to exercise jurisdiction over a nonresident defendant within the limits imposed by the Constitution, the defendant must have certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). The Court has consistently held that this standard mandates jurisdictional contacts through which the nonresident defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958); *see also Kulko* v. *California Superior Court*, 436 U.S.

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33 Under the Act's unique structure it is clear that the foreign sovereign's contacts with the forum which give rise to the cause of action—traditionally concerns of personal jurisdiction—and the determination of the permissible reach of the Act—traditionally subject matter concerns—are inextricably intertwined. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 485 n.5, 489 n.14 (1983). This issue is before the Court only as an aid in interpreting the direct effect requirement of the Act. Whether there is a constitutional basis for personal jurisdiction over Petitioners is not before the Court as an independent question.

84, 93-94 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186, 216 (1977).

Based on that standard, the mere foreseeability of being subjected to the legal process of the forum is an insufficient ground to support jurisdiction. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295-97, (1980); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985). Moreover, because the constitutional basis for jurisdiction must rest on the purposeful acts of the defendant, the Court has made it clear that the unilateral actions of a plaintiff—whether foreseeable or not—also are an insufficient basis upon which to exercise jurisdiction over a nonresident defendant. *Hanson*, 357 U.S. at 253; *see also Kulko*, 436 U.S. at 93-94.[34] It is clear that the Act could not reach this case and still be within constitutional bounds, because the Respondents' act of calling for payment in New York, even when combined with Argentina's prior knowledge that they could do so, does not supply the necessary contact with the forum upon which jurisdiction can rest.

Even where the defendant itself has approached the forum in some manner, an attenuated contact, such as that present here in the form of listing New York as a possible place of payment, will not suffice as a jurisdictional predicate. *Burger King*, 471 U.S. at 475. The dispute in *Burger King* arose out of a Michigan resident's alleged breach of a franchise agreement with a Florida corporation, and the corporation sued in Florida. The Court found that the exercise of jurisdiction over the defendant in Florida was consistent with due process, because the "dispute grew directly out of 'a contract which had a *substantial* connection with that State.' " *Id.* at

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34 Indeed, if foreseeability were a "sufficient benchmark" for personal jurisdiction under the Constitution, the Court has suggested, its holdings in *Hanson*, 357 U.S. 235, and *Kulko*, 436 U.S. 84, would have been different. *World-Wide Volkswagen*, 444 U.S. at 295-296. Surely, the Court has observed, it was foreseeable in *Hanson* that the settlor of a Delaware trust would later move to Florida; and it was no doubt foreseeable in *Kulko* that an ex-wife would move to California to be joined there later by her minor daughter. *Id.* at 296. Nevertheless, the Court in both cases found minimum contacts lacking.

479 (quoting *McGee*, 355 U.S. at 223 (emphasis in *Burger King*)). The facts in *Burger King* are a good illustration of the types of contacts necessary to meet this test: in addition to causing the alleged injury in Florida, the defendant engaged in extensive negotiations with the Miami headquarters of Florida-based Burger King, and entered into a contract which (a) provided that the agreements were made in and to be enforced from Miami, (b) provided for the continuing supervision of the defendant by the Florida headquarters and (c) provided that all disputes would be governed by Florida law. *Burger King*, 471 U.S. at 479-81.[35]

This "substantial connection" analysis was reaffirmed two years later in *Asahi Metal Industry Co.* v. *California Superior Court*, 480 U.S. 102 (1987). Citing *Burger King* and *McGee*, Justice O'Connor stated that

> "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.[36]

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35 While it is not inconceivable that a single forum act might, under certain circumstances, create a "substantial connection" so as to support the assertion of jurisdiction, a contract between an in-state resident and a foreign party, standing alone, cannot. *Burger King*, 471 U.S. at 478 (1985). Although this Court's decision in *McGee*, 355 U.S. 220, permitted the assertion of jurisdiction in California over a Texas corporation for a suit "based on a contract which had a substantial connection" with California, *id.* at 223, jurisdiction in *McGee* rested not merely on the existence of the contract, but also on the facts that the defendant corporation delivered the contract in California, received premium payments mailed from California, and the insured was a resident of California when he died. *Id.* In addition, the Court noted that California had an interest in "providing effective means of redress for its residents." *Id.*

36 Chief Justice Rehnquist, and Justices Powell and Scalia also endorsed this view. *Asahi*, 480 U.S. at 108-113 (1987). All nine Justices agreed that the exercise of jurisdiction over Asahi would violate due process, *id.* at 105-108, but four Justices—Justices Brennan, White, Marshall and Blackmun—rested their decision solely on the analysis of reasonableness also put forth by Justice O'Connor. *Id.* at 116-121.

Id. at 112 (emphasis in original) (citations omitted). Relying on this now established principle, four Justices in *Asahi* found that mere awareness on the part of Asahi that its components, manufactured and sold outside the United States, would reach a California market did not constitute a substantial connection so as to permit the exercise of personal jurisdiction over Asahi by the California courts. *Id.* at 112, 113.

While this case falls somewhere between *Burger King* and *Asahi*, it is much closer to the latter. It clearly lacks the substantial connection with this country required as a constitutional minimum for jurisdiction. The multiplicity of purposeful contacts that the defendant had with the forum in *Burger King* are not present in this case. To the extent that the *Asahi* defendant's awareness that its product would likely come to rest in California is not an adequate contact with the forum state for jurisdictional purposes, neither can the Petitioners' awareness that New York might be chosen as the place of payment from among the listed options of New York, Zurich, London or Frankfurt substitute for the requisite minimum contact here.[37]

For all of these reasons, jurisdiction over this action does not lie under the FSIA. Congress determined that the jurisdiction of the United States courts cannot be extended to foreign sovereigns except under the exceptions set forth in the Act. The language and structure of the Act, and its inherent constitutional limitations, compel the conclusion that Peti-

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37 This is especially true because, while residence of the plaintiff in the forum is not a requirement for the assertion of jurisdiction over a foreign defendant, *see Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), it is not irrelevant to the jurisdictional inquiry. *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984). While the plaintiff's lack of contacts with the forum ordinarily will not defeat otherwise proper jurisdiction, they may be so important as to permit jurisdiction where it would not otherwise exist. *Calder* v. *Jones*, 465 U.S. 783, 788 (1984). This case presents the unusual circumstance where the opposite may be true: to the extent that Congress crafted the direct effect basis of jurisdiction to take the plaintiff's contacts into account—*i.e.*, by focusing on where the plaintiff's injury is felt—a key requisite for jurisdiction is missing where, as in this case, even the plaintiff's contacts with the forum are minimal.

tioners' failure to pay Respondents, foreign corporations with no connection with this country other than their requests to be paid here, is an insufficient nexus with this country to support jurisdiction of this action.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed, and the Complaint in this action should be dismissed.

Respectfully submitted,

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No. 91-763

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

vs.

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC., and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. AND BANK CANTRADE A.G.

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QUESTIONS PRESENTED

1. Whether petitioners' issuance of internationally-negotiable bonds is a "commercial activity" under the Foreign Sovereign Immunities Act.

2. Whether respondents' loss from petitioners' intentional failure to make interest and principal payments in New York as required by the bonds is a "direct effect" under the Foreign Sovereign Immunities Act.

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No. 91-763

IN THE

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OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

vs.

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC., and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. AND BANK CANTRADE A.G.

STATEMENT OF THE CASE

Respondents own $1,330,000 of bonds issued by petitioners in 1982. These bonds are denominated and payable only in United States dollars and for that reason are known as "Bonods". In 1986 petitioners defaulted on these Bonods. Respondents brought this action under the Foreign Sovereign Immunities Act (the "FSIA" or the "Act"), 28 U.S.C. §§1602 *et seq.*, to recover their principal and accrued interest.

Respondents Weltover, Inc. and Springdale Enterprises, Inc. are corporations organized under the laws of Panama, and they are assignees of original holders of the Bonods. Respondent Bank Cantrade, A.G. is organized under the laws of Switzerland, and it is an original holder of the Bonods. There are no corporations to be listed pursuant to Rule 29.1.

Petitioners are the Republic of Argentina and its central bank.

In 1982 petitioners effectively nationalized the multi-billion foreign debt of Argentine commercial corporations. They assumed this debt by issuing the Bonods and promissory notes to the creditors of those corporations. JA 17, §9.

The Bonods are rather ordinary financial instruments. They provide for scheduled payments of interest and principal, which were to be completed in November 1987. JA 23-24. The Bonods are internationally-negotiable, except to citizens and residents of Argentina. JA 24. They are denominated in United States dollars because respondent Republic of Argentina does not have a currency that is acceptable internationally. JA 14, §4.

Principal and interest payments are to be made in one of four world financial centers, including New York City, at the exclusive option of the bondholder. JA 25.

For a while petitioners made scheduled interest payments. Each of the respondents received payment in the United States. In May 1986, at the time the first portion of principal was payable to bondholders, petitioners defaulted. JA 9-11. Petitioners tried to make respondents "roll over" the Bonods into other securities, but respondents refused. JA 9-11. It should be noted that petitioners' default was unilateral and was not the product of any cooperative enterprise of world financial organizations. Pet. App. A at 4a.

Petitioners have acknowledged their default, although their affiant refers to it as an "adjustment of capital maturity dates". JA 18, §12.

In 1989 respondents brought this action under the FSIA in the United States District Court for the Southern District of New York. Petitioners moved to dismiss the complaint on the grounds that there was not subject matter jurisdiction under the FSIA, that there was not personal jurisdicition of the petitioners, and on the grounds of *forum non conveniens*. Their motion was denied in its entirety.

In 1991 petitioners appealed the denial of their motion, regarding subject matter jurisdiction only, to the United States Court of Appeals for the Second Circuit. The Second Circuit held that issuing the Bonods was a commercial activity in that it "immersed [the petitioners] in the stream of international commerce" and that petitioners' failure to pay in New York according to the Bonod terms was a "legally significant act" causing direct effects "in New York when [respondents'] accounts were not credited with. . .U.S. dollars." Pet. App. A. 10a, 14a.

SUMMARY OF ARGUMENT

The Petitioners's breach of their contractual obligations in the Bonods is an act outside the United States in connection with a commercial activity, and it caused a direct effect in the United States in connection with a sovereign's commercial act. Under the Foreign Sovereign Immunities Act, Petitioners are liable to suit in United States courts. 28 U.S.C. §§1604, 1605(a)(2).

The plain meaning of the FSIA is that the nature of the Bonods, not Petitioners' purpose, determines the commercial nature of the Bonods. 28 U.S.C. §1603(d). Negotiable debt instruments like the Bonods are by definition commercial. They exist as an exchange of the fundamental commercial medium in the classic commercial equation: money for time. The decisions of the lower courts support this conclusion of commerciality. Their primary investigation in determining commerciality under the FSIA is whether a private party could carry out the type of activity in question. If so, the activity is commercial, regardless of the purpose for which the sovereign undertook it. This concentration on nature rather than purpose fully complies with the plain meaning of the statute. Petitioners'

argument boils down to the purpose for which they issued the bonds. Legislative history, to the extent that it is relevant given the clear statutory mandate of Congress, supports the idea that the Bonods are just like any other commercial instrument under the Act.

Petitioners were obliged to perform their contract entirely within the United States at respondents' demand. When they defaulted, the loss was felt here in New York City, where respondents' accounts were to be credited. The loss was directly the result of petitioners' election not to pay. It was a substantial effect, since petitioners' payment constituted all executory performance under the Bonods. The effect was foreseeable, as petitioners intended that the defaulted payments not be made. Finally, petitioners once more attempt to read the statute with requirements that Congress never wrote into it: Their argument that there cannot be a direct effect because petitioners are not subject to due process jurisdiction confuses two important — and separate — concepts. More than that, their voluntary implication of the United States in the entire Bonod process — by selecting New York as a place of payment and by making the Bonods payable in U.S. dollars — makes them entirely open to suit in this country: Petitioners were able to offer the Bonods only by banking on the security and stability of our government and our financial system.

ARGUMENT

The FSIA was designed to remove one particular barrier to suit, the immunity of foreign sovereigns. *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981). The Act provides jurisdiction over foreign states whenever a sovereign's "act outside the United States in connection with a commercial activity of the foreign state elsewhere. . . causes a direct effect in the United States." 28 U.S.C. §1605(a)(2).

The FSIA does not limit suits against sovereigns based on the citizenship of the plaintiff. A foreign corporation or individual may prosecute an action as long as the substantive standards of the FSIA are satisfied. *Verlinden, B.V., v. Central Bank of Nigeria*, 461 U.S. 480, 490-91 (1983).

Petitioners' issuance of the Bonods involves commercial activity, and their failure to make payment in New York, as required by the Bonods, caused a "direct effect" in this country.

I. PETITIONERS' ISSUANCE OF THE BONODS WAS COMMERCIAL ACTIVITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The FSIA expressly provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or activity or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d). A straight-forward application of this statutory definition compels the conclusion that petitioners were engaged in commercial activity. Viewed in terms of their nature, and not in terms of their purpose, the Bonods are simply a debt instrument embodying a classic commercial transaction. Petitioners' contrary argument rests on an inversion of the FSIA's language and a misrepresentation of its legislative history.

A. Under the plain language of the Act, the nature of a sovereign's conduct determines that conduct's commerciality.

The starting point for any issue of statutory interpretation, of course, is the ordinary meaning of the language of the statute.

See, e.g., Demarest v. Manspeaker, ____U.S.____, 111 S.Ct. 599, 602 (1991). When such language is "clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed language of Congress." *Mobil Oil Exploration v. United Distribution Co.*, ____U.S.____, 111 S.Ct. 615, 623 (1991) (Internal quotations omitted.); *see, United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989).

The application of this standard demonstrates that the Bonods are commercial. The petitioners contracted to pay back borrowed money in New York City (or other international financial centers) with interest in United States dollars. They did so by issuing internationally-negotiable bonds. This Court need not go farther than a passable dictionary to determine that petitioners' conduct "relates to or [is] connected with trade and traffic or commerce in general", *Black's Law Dictionary, 5th Ed.*, (St. Paul 1979), and is "of, in or . . . related to or dealing with commerce . . . used in or characteristic of commerce." *Webster's Third International Dictionary* 456 (Springfield, Mass. 1986). Examples of international commerce are the flow of "[g]oods and services . . . from one nation to another" and the flow of "[c]apital . . . for the establishment of a foreign enterprise." Vishny, *Guide to International Commerce Law* § 1.01 (Colorado Springs, 1981). An individual's negotiable debt instruments are covered in this country by the Uniform Commercial Code. *e.g.*, N.Y. L.1962, Ch. 553, Article 3, §3-102.

The Second Circuit was thus plainly correct when it described the nature of petitioners' conduct as "clearly" commercial, Pet. App. A at 10a, and when it deemed the commerciality of a nation's negotiable promissory notes "self-evident", *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991). Commerciality is inherent in certificates of deposit held by a later-nationalized bank, *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109-10 (5th Cir. 1985), *West v. Multibanco Comerex, S.A.*, 807 F.2d 820, 825 (9th Cir. 1987), and in letters of credit, *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

The conclusion that negotiable debt instruments like the Bonods are properly construed as commercial is also fully consistent with the lower courts' application of the commercial exception. In essence, those courts have asked whether a private person can perform the *type* of activity sued upon, or whether that type of activity can be performed only by a sovereign. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, *supra*, 647 F.2d at 309; *Velidor v. L/P/G/ Benghazi*, 653 F.2d 812, 817, n.7 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Callejo v. Bancomer, S.A.*, *supra*, 764 F.2d at 1109; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987).

This analysis of the *nature* of the conduct, rather than its purpose, ensures fidelity to the plain meaning of Section 1603(d). Obviously, any act by a sovereign is at least theoretically grounded in an ultimate public purpose; but under the FSIA, that is not a determinant of commerciality. This point has been repeatedly emphasized. Thus, for example, an agreement to promote Spanish wines is commercial, although the overall purpose is to reduce Spanish unemployment. *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987). An agreement that doctors perform kidney transplants on Greek citizens is commercial, although the overall purpose is to implement the Greek national health plan. *Rush*, *supra*, 877 F.2d at 580. A lease to rent a consular residence is a commercial transaction, although the purpose is clearly diplomatic. *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). By the same token, the Bonods – contracts to rent money – are commercial, even though petitioners allege that their purpose was to implement a public policy.

B. Under the plain language of the Act, as well as the legislative history of the Act, Petitioners' purpose cannot be a factor in determining the commerciality of their conduct.

Petitioners' effort to argue that the Bonods are not within the commercial exception of §1605(a)(2) relies, to begin with, on a totally distorted interpretation of the statutory language. Seizing on the word "nature" in the definition of commercial activity, petitioners argue that one must study the "context" in which the sovereign's conduct occurs. Pet.Br. 18. That approach, however, eviscerates the nature/purpose distinction on which the statutory definition turns. Indeed, petitioners' entire argument rests on their assertion of *why* the Bonods were issued, to "address a domestic crisis. . .and to control [Argentina's] critical shortage of foreign exchange." Pet. Br. 23-24. Petitioners' "context" is only a euphemism for "purpose", and the plain language of the FSIA is not so easily evaded.[1]

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[1] Petitioners offer a single authority on this point, *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). Even assuming that the plain meaning of the FSIA can be disregarded, *DeSanchez* is uniquely and easily distinguishable.

The plaintiff was the wife of President Somoza's top general and was safely ensconced in Miami. As that regime teetered, she sought to redeem a $150,000 (U.S.) certificate of deposit held in a Nicaraguan bank, but the terms of the certificate did not permit it. Nevertheless, the central bank was directed to sell to the depository bank the U.S. dollars necessary to effect the redemption, on the authority of the bank's president – General DeSanchez' cousin – and of President Somoza himself. By the time Sra. DeSanchez' American bank sent the check to Nicaragua for collection, the new government refused payment. The Fifth Circuit found this tainted transaction to be sovereign for a number of reasons, one of which was Nicaragua's purpose to protect foreign currency reserves.

No reported decision cites the result of *DeSanchez* as authority: It is an anomoly in FSIA jurisprudence. Petitioners' reference to the Seventh Circuit's commentary understandably omits that court's conclusion:

> [T]o give the "commercial exception" its proper scope, *DeSanchez* must be limited to the extraordinary circumstances before the court in that case. *Rush, supra*, 877 F.2d at 579, n.5.

(Footnote continued)

Petitioners also purport to find support for their position in the FSIA's legislative history. This argument is likewise untenable. As an initial matter, petitioners' reliance on legislative history —even if it were accurate— would be irrelevant here in view of the statute's clear language. *See, e.g., Burlington N.R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). But petitioners' reading of legislative history is no better than its reading of statutory text. Thus, petitioners begin by citing a precursor to the final statute which contained a provision — omitted from the statute as adopted— that would have immunized "obligations incurred for general government purposes." Pet.Br. 14, n.11, quoting proposed but unpassed §1606 of HR 11315. Petitioners then reason that the rejection of this provision means Congress wanted case-by-case analysis of which debt obligations are commercial and which are not.

In fact, Congress's blanket elimination of a debt exemption provides strong support for the proposition that Congress meant to include *all* "debt obligations incurred for general governmental purposes" within the commercial exception. The report accompanying the Act confirms that view, explaining that the proposed debt exception was eliminated because

> [A] sale of bonds to the public. . .[is] *of a commercial nature and should be treated like other commercial transactions.* House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* U.S.C.C.A.N., 6604 (the "House Report"), at 10. (Emphasis added.)

Even district courts which otherwise would be expected to adhere to the ruling have withdrawn from it. *Chisholm v. Bank of Jamaica*, 643 F.Supp. 1393, 1400, n.5 (S.D.Fla. 1986). ("The court is confident that the Fifth Circuit would have ruled otherwise under less stressful political conditions.") *Hester International Corp. v. Federal Republic of Nigeria*, 681 F.Supp. 371, 383 (N.D.Miss. 1988), *affirmed on other grounds*, 879 F.2d 170 (5th Cir. 1989). (*Texas Trading* and *Chisholm* are cited for the principles of determining commerciality; *DeSanchez* is not mentioned.)

See, id. at 16. [Specifying that a sovereign's "borrowing of money. . .would be [among the activities] included within the definition" of a commercial transaction.][2]

Accordingly, the legislative history, far from supporting petitioners, supports respondents' view that the Bonods are commercial.

Petitioners' emphasis on the sovereign nature of currency regulations, Pet.Br. 22-3, is equally unavailing. Petitioners now appear to argue that they were prevented from paying their obligations by currency regulations they themselves promulgated. If petitioners are really serious about this proposition, they must be arguing that any sovereign can abrogate the provisions of the FSIA simply by passing a law that prevents the sovereign from fulfilling its obligations. Again, petitioners seek to evade the FSIA rather than follow it.[3]

Ultimately our response returns to plain meaning: Under the FSIA, the nature of negotiable financial instruments is commercial; it does not matter why they were issued. And it is the plain meaning of the statute that petitioners' argument fails to overcome.

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[2] Petitioners misleadingly cite a sentence from a section of the House Report which deals only with "[c]ommercial activity carried on *in the United States* by a foreign state", *id.* at 17 (Emphasis added.), and which mentions two examples of that conduct. Petitioners conclude that "neither of those scenarios is present here." Pet. Br. 15. This tautology does not advance petitioners' cause as the instant case is not about commercial activity carried on in the United States but, rather, "commercial activity of the foreign state elsewhere." §1605(a)(2), clause 3 And debt instruments like the Bonods – as the proper references to legislative history make clear – do involve "commercial activity".

[3] Petitioners's reliance on *Braka v. Bancomer, S.N.C.*, 762 Fed.2d 222, 225 (2d Cir. 1985) is misplaced. Their cited quotation is the Second Circuit's explication of the "activity that implicates *act of state* concerns". 762 F.2d at 225 (Emphasis added.) Indeed, the district court deemed commercial the plaintiffs's certificates of deposit held in Mexican banks in Mexico, found subject matter jurisdiction under the FSIA, but dismissed the complaint because Mexico's actions comprised an act of state. *See Braka v. Bancomer, S.A. [sic]*, 589 F.Supp. 1465, 1470-1472 (S.D.N.Y. 1984). In any event, the act of state defense is relevant only after the court concludes that there is subject matter jurisdiction. *See, e.g.*, Pet. Br. 27.

II. PETITIONERS' BREACH OF THEIR BONOD OBLIGATIONS CAUSED A "DIRECT EFFECT IN THE UNITED STATES" UNDER THE ACT.

To come within the commercial exception of the FSIA, a plaintiff must show that the commercial activity in question has some nexus with the United States. House Report, *supra*, at 18. In particular, Section 1605(a)(2) of the FSIA sets out three conditions, any one of which is sufficient to satisfy this nexus requirement. Petitioners' failure to make payment in New York, as required by the terms of the Bonods, meets this requirement.

A. The breach of a contract to be performed in this country creates a direct effect in the United States.

The commercial exception applies "in any case. . . in which the action is based upon. . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." §1605(a)(2). In this case, respondents' claim is based specifically on petitioners' failure to make payments in U.S. dollars to respondents' accounts at New York banks designated by respondents.*

The direct effect, plain and simple, resulted from petitioners' non-performance of a contract that was by its terms to be performed in this country. Thus, this case is no different from one in which a foreign state reneges on an agreement to deliver a million pairs of shoes or a million tons of grain in this country, actions which self-evidently have a direct effect here. *See, e.g.*, Lowenfeld, "Claims Against Foreign States – A Proposal for Reform of United States Law," 44 N.Y.U. L. Rev. 901, 914-15 (1969):

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* Although it has not been argued before, petitioners' pattern of payment and breach could well be deemed acts "performed in the United States in connection with a commercial activity of the foreign state elsewhere." §1605(a)(2), clause 2. In that case, direct effect would not be a necessary element of subject matter jurisdiction.

> [A] contract . . . for delivery of a shipment at a pier in Hoboken is, in our system, the type of transaction giving rise to liability in New Jersey. Even if such a contract involves a foreign government – whether as buyer, seller, consignee or [*n.b.*] guarantor – the transaction and its potential for creating liability has not changed.[5]

Nor can this case be distinguished on the ground that petitioners' promised "cargo" was money. The computer network that can move millions of dollars around the world with an electromagnetic signal is as much a conveyor as the largest merchant steamer.

This interpretation of "direct effect" *is* the plain meaning of the statutory language, and it also has the virtue of enabling a foreign state to control its own destiny by choosing – or not choosing – a particular place of performance. In this case it is hard to see why petitioners should be heard to complain when *they* had the complete ability to avoid jurisdiction here simply by not making the Bonods payable in this country.

In view of these considerations, it comes as no surprise that, while petitioners are adamant in the belief that their actions had no "direct effect" here, they make no effort to locate that conclusion in the statutory language. Instead, their entire reliance on the statutory language is to assert, *ipse dixit*, that "[i]t is difficult to conceive" how respondents' loss could ever be a "jurisdictionally-sufficient direct effect." Pet.Br. 26-27. That argument merely reflects a limitation on petitioners' conceptual ability; it has nothing to do with the language of the FSIA. The truth is that petitioners never even attempt to suggest what a "direct effect" under the FSIA might be, precisely

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[5] Indeed, Professor Lowenfeld's proposed statute specifically held foreign sovereigns subject to jurisidiction in U.S. courts on any action based upon "an express or implied contract . . . to be performed . . . in the United States". Lowenfeld, *id.*

because they cannot provide a plausible definition that excludes this case.[6]

Absent any grounding in statutory language, petitioners are forced to misrepresent the holding below, to say that the Second Circuit "rested its finding" on public policy principles rather than the "effect of Petitioners' actions on Respondents". Pet.Br. 27. It is simplest to let the Second Circuit speak for itself:

> Here, the contract gave [respondents] the option to call for payment in New York. [Respondents] exercised that option. The legally significant act was defendants' failure to abide by the contract terms; i.e., to make payments in New York. The effects occurred when the [respondents'] accounts were not credited with the outstanding amount of U.S. dollars. As such, the act of nonpayment caused a direct effect in the United States. Pet. App. A at 14a[7].

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[6] Petitioners' reliance on the House Report does not assist their cause. The Report refers to Section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), which provides that United States law may be prescribed when the effect in the U.S. is "substantial" and occurs "as a direct and foreseeable result of the conduct outside the country." These criteria are all satisfied here: The failure to perform was the "direct and foreseeable result" of petitioners' instructions not to honor the bonds in New York; and the effect was "substantial" in that it led to a *total* default of petitioners' obligation, not to a short delay or other minor deviation from the terms of performance. Thus, even if the House Report's reference to Section 18 can permissibly be used to add the words "substantial" and "foreseeable" to the actual statutory language – *i.e.*, "direct effect"– those additional criteria are met in this case.

[7] It is, in fact, petitioners who argue policy, albeit without support. Expectedly, they raise the spectre of our courts clogged with suits by foreign plaintiffs against foreign sovereigns. Pet.Br. 29. "Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." *Verlinden*, *supra*, 461 U.S. at 490. The Court's quoted language was specifically in response to the very testimony petitioners cite in their brief. *Cf.* Pet.Br. 29.

Perhaps the most curious misconception that petitioners advance is that their breach of their obligation to pay in New York at a bondholder's demand is, nevertheless, a nebulous tie with the United States. This is not so much argument as self-fulfilling prophecy: Early on, when petitioners made their pre-default payments as they promised, they did indeed name specific New York banks to receive specific funds into specific accounts in New York and to distribute those funds to other specific accounts in New York, and there was a direct effect in the United States – a positive one – as respondents' accounts were credited. When petitioners breached their agreement, the effect was direct again, but this time quite negative.

It is, in short, indisputable that when a party has a contractual obligation to deliver money to *anyone* in the United States, the failure to deliver that money has a direct effect here. Petitioners so failed, and the direct effect resulted.

B. A determination of "direct effect" is separate from considerations of due process personal jurisdiction.

Apparently recognizing that the language of the statute provides them no support, petitioners for the first time in this Court take the position that the "nexus" reference in the House Report is identical to the due process requirement for *personal* jurisdiction. According to petitioners, if the courts of, say, New York County lacked personal jurisdiction over petitioners based on their activities concerning the Bonods, presumably it would follow that there could not be subject matter jurisdiction. *See* Pet.Br. 29-40[8].

The distinction between the standards for subject matter jurisdiction and due process personal jurisdiction is quite significant. Under the FSIA, subject matter jurisdiction (under Sections 1605-1607) and good service (under Section 1608) result

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[8] It is axiomatic that a question not raised below or in the petition for certiorari is not properly before this court. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981), *Heckler v. Campbell*, 461 U.S. 458, 469, n.12 (1983), citing *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

in statutory personal jurisdiction. 28 U.S.C. §1330(a)-(b) Of course, a suit can continue only when due process personal jurisdiction is present as well – that goes without saying. But the plain language of the FSIA does not remotely suggest that a court is constrained to look *only* to a plaintiff's allegations regarding the commercial exception in making the due process determination. Indeed, the regular procedure is to determine whether the subject conduct is immune, and if not, then to consider due process jurisdiction. *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105, n.18 (D.C.Cir. 1982) (Immunity determination "involves considerations distinct from the issue of [due process] personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind."); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C.Cir. 1982) (Citing *Texas Trading, supra*, that subsequent to the determination of subject matter jurisdiction is the issue of personal jurisdiction.); Kane, "Suing Foreign Sovereigns: A Procedural Compass," 34 Stanford L.Rev. 385, 404 (1982) ("Once the court decides that the foreign state is not immune, it must consider – as it does for every defendant – whether asserting jurisidiction would violate notions of minimal contacts and fair play. Here, too, a federal standard would control.").[9]

C. Assuming arguendo that findings of personal jurisdiction and subject matter jurisdiction are merged, petitioners' conduct provides subject matter jurisdiction under the Act.

Regardless of the validity of petitioners' attempted merger of subject matter and personal jurisdiction, however, their effort to abandon the statutory language of Section 1605(a)(2) in favor

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[9] In the district court, petitioners sought to dismiss the complaint on the additional grounds of lack of personal jurisdiction. The court denied that part of their motion as well, finding that "No serious claim can be made here that plaintiffs have failed to allege contacts of the defendants that would justify the exercise of personal jurisdiction over them." Pet. App. B at 26a. The contacts include petitioners' bank accounts, regular commercial activity, and availment of American law. *Id.*

of their analysis of personal jurisdiction turns out to be the equivalent of jumping from the frying pan into the fire. This court's cases demonstrate beyond doubt that petitioners' activities – even if limited only to the Bonods – support personal jurisdiction in the United States.

It is now well-settled that under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, the decisive factor for personal jurisdiction analysis is whether defendant "purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *See, Asahi Metal Ind. v. Superior Court*, 480 U.S. 102 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts. . . . *Jurisdiction is proper, however, where the contacts proximately result from the actions by the defendant himself. . . .*" *Burger King, supra*, 471 U.S. at 475. (Emphasis added, citations omitted.) *See also Asahi*, 480 U.S. at 112. (Finding of minimum contacts must come about from defendant's action purposefully directed to the forum.)

Petitioners' activities regarding the Bonods amply satisfy this standard. There is nothing "fortuitous" or "random" about petitioners' involvement with this country: Petitioners expressly chose to make New York one of four possible places for performance and required advance notice as to which of the four a particular creditor would select. J.A. 25. More importantly, by agreeing to pay in U.S. dollars, petitioners "purposefully availed" themselves of the benefits of this country's laws and the stability of its financial and currency markets and of our government. Without that stability petitioners could never have issued the Bonods in the first place. To put the matter bluntly, petitioners led investors to believe that they could secure payment in one of the four designated countries and that they could rely on the laws and, if necessary, the courts of those countries to enforce the Bonods. Surely no one would have accepted the Bonods if they could be enforced only in Argentina, in the same way that

no one would have accepted the Bonods (or purchased them on the international market) if they had been payable in Argentine australs.

Petitioners used the United States as a silent guarantor of the value of the Bonods: our currency, our financial markets, our government. They forget all this – or at least pretend to – now that they are called upon to meet their obligations. There is no basis at all for petitioners' belated claim that our courts lack subject matter jurisdiction over them with respect to their activities in issuing the Bonods.[10]

Ignoring these established principles, petitioners cite a few lower court cases for the proposition that "the fact that [a] note is payable in the forum state, *without more*, is not sufficient to support long-arm jurisdiction over the maker." Pet.Br. 33. (Emphasis added, footnote citations omitted.) In this case there *is* "more". Petitioners' cases involve one basic scenario: An individual in one state agrees to pay a note by wire or mail to a creditor in another state, and when there is a default, the creditor sues in his home state, although the debtor has never had anything to do with the forum, other than through the interstate banking system. *See* Pet.Br. 33-34 (citing cases). But even under those facts, as petitioners recognize, the courts are not in agreement as to whether personal jurisdiction exists. *See, e.g., Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309 (10th Cir. 1982); *Federal Deposit Ins. Corp. v. Culver*, 640 F.Supp. 725 (D.Kan 1986). *Cf. Carnival Cruise Lines v. Shute*, __ U.S. __ 111 S.Ct. 1522 (1991). (Enforcing forum selection in boilerplate contract).

All of this, ultimately, is beside the point. Whatever the correct answer may be in the situation depicted by petitioners, it has no bearing here, where the *debtor* chose a payment forum

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[10] Despite petitioners' efforts to focus on *respondents'* contacts with this country, that consideration clearly has no bearing on *petitioners'* amenability to suit here. *See, e.g., Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). As noted above, a foreign plaintiff can sue in the United States under the FSIA. *Verlinden, supra*.

other than its own jurisdiction – and a medium of currency other than its own – precisely because *absent the protection of the laws of that other forum*, the debtor would not have been able to market its bonds. Petitioners have not cited, and could not cite, a single case denying personal jurisdiction on facts anywhere near those presented here. Accordingly, to the extent that the nexus requirement of the commercial exception is tied to the requirements of personal jurisdiction, respondents' position that nexus is here is all the more compelling.

CONCLUSION

For all the reasons set forth above, the decision of the United States Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

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OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF REPUBLIC OF ARGENTINA AND BANCO CENTRAL DE LA REPUBLICA ARGENTINA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-763

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF REPUBLIC OF ARGENTINA AND BANCO CENTRAL DE LA REPUBLICA ARGENTINA

ARGUMENT

The Respondents implicitly and the Government expressly urge the Court to impose two rules for administering the Foreign Sovereign Immunities Act of 1976[1] (the "FSIA" or the "Act"):

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1 Pub. L. No. 94-583, 90 Stat. 2891, *codified as* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

- that issuance by a sovereign of any debt that can be held by private parties is *per se* commercial activity, and

- that non-payment of a dollar-denominated debt designated to be paid in the United States causes a "direct effect" here, even where there are no other lawsuit-related contacts with the United States and no United States-related person suffered any financial loss.

Neither of these rules, however, is supported by the language or the legislative history of the FSIA. In addition, neither the Respondents nor the Government addresses the practical and inevitable results of the tests they urge, which would expand jurisdiction over foreign sovereigns in a manner never intended by Congress.

More fundamentally, the Government rests its analysis of the commercial activity question on a premise that is critically flawed. Specifically, the heart of the Government's commercial activity analysis is its assertion that the Bonods at issue were created "to refinance the obligations of the Argentine private debtors" (Gov't Br.[2] at 6). This simply is wrong. In fact the Bonods refinanced Banco Central's own obligation to provide foreign exchange under the Argentine foreign exchange insurance contract program ("FEIC") (Br.[3] at 3, 6-8).[4] Moreover, the relevant analysis in any event is to evaluate the *nature* of the obligation that gave rise to the Bonods (*see* Br. at 17-20; *infra* pp. 6-9).

The FEIC—the obligation which gave rise to the Bonods—in effect set official future exchange rates for particular

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2 Reference is to the Brief for the United States as Amicus Curiae.

3 Reference is to the Brief of Republic of Argentina and Banco Central de la Republica Argentina.

4 Indeed, Banco Central's obligation did not even arise until the private party in each instance totally fulfilled its financial obligation by paying the required amount of pesos, as called for by its original credit obligation, to Banco Central (Br. at 7; J.A. 16).

transactions (Br. at 4, 7).[5] The Bonods were created to meet the Argentine Government's obligation to supply foreign exchange under the FEIC, at the exchange rates set earlier by the FEIC, when its own reserves were insufficient to do so when its obligation came due (Br. at 7). All of the relevant characteristics of the Bonods and their origin, to which the Court should look to determine the nature of the sovereign conduct at issue here, confirm that the relevant conduct in this case is conduct in which private persons do not engage (*see infra* pp. 8-9). In obscuring this important point, the Government, as well as the Respondents, treat as commercial the Argentine Government's implementation of its own fiscal and exchange policies—conduct which has been recognized as being at the core of a government's sovereign responsibilities (*see* Br. at 22-23).

I. THE FSIA DOES NOT PROVIDE FOR OR PERMIT THE PROPOSED *PER SE* RULE DEFINING COMMERCIAL ACTIVITY

The plain language of the FSIA eschews any *per se* definition of commercial activity—for debt or otherwise—and instead mandates a process to be used to evaluate the commercial or sovereign nature of foreign state conduct (Br. at 14-17). In the face of this clear Congressional choice, the Government in particular asks the Court to engraft upon the FSIA language which does not exist. This the Court should refuse to do. *See Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2636 (1991) (courts may not create an exception where Congress has declined to do so).

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5 For all of the reasons discussed in Petitioners' opening brief (Br. at 3-6), the regulation of Argentina's foreign exchange rates and reserves, of which the FEIC was but one component, was one of the fundamental responsibilities of Banco Central. In the relevant time period, Banco Central was charged with regulating the foreign exchange market and setting Argentina's official exchange rates in a manner designed to meet the needs of that country's economy (Br. at 6).

A. The Statute Does Not Support The Establishment Of Any *Per Se* Rule

Neither Respondents nor the Government disputes that the absence from the FSIA of a *per se* rule pronouncing that the issuance of debt, or any other particular activity, is commercial in all cases is no accident. Indeed, Congress expressly chose not to include a precise definition of commercial activity in the Act, but to leave it to the courts to work out "on a case-by-case basis . . . the distinction between commercial and governmental" (Br. at 16) (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) [hereinafter *House Hearings*]).

The Government's recitation of the Act's legislative history (*see* Gov't Br. at 14-15) (citing House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 [hereinafter *House Report*]) is not to the contrary. While the Government cites the maxim that congressional deletion of limiting language prior to enactment permits the presumption that the limitation was not intended (Gov't Br. at 15) (citing *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983)), this should be true only in the absence of any congressional explanation for the deletion. Here, however, while deleting the express provision relating to public debt, Congress at the same time made clear that all activity was to be analyzed on a case-by-case basis. Thus the deletion does not mean that all debt is automatically commercial, as the Government would have the Court conclude.

Moreover, the *House Report* language the Government points to would classify as commercial only a government's direct borrowing from banks, or its sale of bonds to the public "though bond markets and stock exchanges" in this country—conduct which the Government acknowledges is not present in this case (Gov't Br. at 13 n.8). Each of these types

of debt is vitally different in nature from the Bonods—instruments issued by a central bank without consideration to refinance a government's own obligation under a macro-economic program designed to deal with massive devaluation of its currency and a critical lack of access to foreign exchange.

B. There Is No Support For The Substance Of The Proposed *Per Se* Rule

In addition to the fact that the very notion of a blanket rule was rejected by the Act's drafters, the Court is being urged to adopt a test that would distinguish between debt instruments held only by governments and those capable of being held by private parties, a distinction for which the FSIA provides no support. The Government offers no rationale whatsoever for this proposed distinction.[6] Indeed, as even the Government recognizes, a government may lend money as part of a commercial transaction[7] or as a non-commercial transaction between central banks in connection with implementation of some sovereign policy (*see* Gov't Br. at 13-14 n.9). For FSIA purposes, however, the nature of such a transaction does not turn on whether the debt-holder is a public or private entity; under the Act, it depends instead on the nature of the transaction underlying the debt.

The *per se* approach advanced by the Government and the Respondents also finds no support in their proffered dictio-

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6 The Government simply concludes, without explanation, that such transactions "would likely differ substantially in form and terms" from the instruments at issue (Gov't Br. at 13-14 n.9). To the extent that it believes its distinction to be a meaningful one because government lenders would have the ability and/or expertise to negotiate their own jurisdictional protections, such as waivers of immunity, in their loan instruments, the Government ignores an important fact in the record: the potential Bonod-holders could have sought, and elected not to seek, alternative instruments which in fact contained an express waiver of immunity. Others pursued this alternative and secured the promissory notes (*see infra* pp. 12-13; *see also*, *e.g.*, J.A. 108-109).

7 An example would be a loan to finance the acquisition by the borrower of products manufactured within the lender's borders.

nary definition of the term "commercial" as denoting a relationship or connection to " 'trade and traffic or commerce' " (Resp. Br.[8] at 6; Gov't Br. at 12) (citing BLACK'S LAW DICTIONARY 245 (5th ed. 1979)). Since all types of concededly sovereign conduct relate or connect "to trade and traffic or commerce" in some way, such a definition hardly provides a basis for distinguishing commercial from sovereign activity under the FSIA. The declaration of a bank holiday by the government, for example, certainly meets the dictionary definition, but there can be little doubt that it would constitute a sovereign, and not a commercial act.[9]

C. Defining The Nature Of Certain Government Conduct Requires Examination Of Its Context

Neither Respondents nor the Government points to any statutory language or other authority which suggests that the Act requires the foreign state conduct at issue to be removed from its context and evaluated in isolation as they urge. To be sure, certain instances of government conduct, such as buying goods or services, or borrowing money to finance such purchases, are identifiable on their face as classically commercial.[10] In a variety of contexts, however, determining the nature of a government's activities requires an analysis of the specific context in which it takes place.

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8 Reference is to the Brief of Weltover, Inc., Springdale Enterprises, Inc. and Bank Cantrade, A.G.

9 Another example could arise in connection with the United States Government's insuring of deposits at banks. If in a moment of extreme fiscal crisis the United States issued bonds instead of cash to fulfill its obligation to pay depositors at failed insured institutions, such an action would meet the dictionary definition, yet clearly would constitute sovereign activity.

10 That is because these transactions meet the standard intended by Congress, which is that a contract or transaction is deemed commercial "if of the same character as . . . might be made by a private person." *House Report*, *supra*, at 16. As expressed at the congressional hearings on the bill that ultimately became the Act, in evaluating sovereign conduct it was expected that the courts "would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments." *House Hearings*, *supra*, at 53.

While the Government and the Respondents characterize this as an improper detour into "purpose" (Resp. Br. at 8; Gov't Br. at 16), this label is neither correct nor helpful: such an analysis is in certain instances essential in order to make meaningful the FSIA's mandate that the commercial or sovereign quality of particular conduct be determined by reference to its nature. Indeed, the Government recognized this in articulating a position and an analytical approach to the Ninth Circuit that is directly at odds with its position before this Court. *See Gregorian* v. *Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). Specifically, in *Gregorian* the Government successfully urged the court to find that the acts of writing and publishing an article in *Izvestia* were sovereign and not commercial conduct. *Id.* at 1522. An approach such as that advocated by the Government and Respondents in this case, which always rejects any consideration of the context in which foreign state conduct occurs—and looks only at the final act creating the cause of action—would cause virtually every complained-of act by a foreign sovereign to be classified as no different than conduct engaged in by private parties.

An example of the proper analysis is found in the Seventh Circuit's decision in *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987). There, the court had to determine whether the retention of the plaintiff by the Spanish Government to market Spanish wines was commercial or sovereign. While ultimately finding that the conduct was commercial, the court recognized that merely characterizing the conduct as a contract for the purchase of services—something a private party plainly could do—was insufficient to resolve the inquiry. Instead it was necessary to analyze the nature of the duties to be performed under the contract. 853 F.2d at 164-65. If they involved, for example, the provision of diplomatic services, then entering into the contract would be sovereign and not commercial. *See also Rush Presbyterian-St. Lukes Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 579 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989) (noting that employment relationship with diplomats

or soldiers would be sovereign); *cf. Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (analyzing the manner in which claim arose for purposes of applying FSIA immovable property exception).

As discussed in Petitioner's opening Brief, understanding the nature of a particular debt instrument similarly requires analysis of the nature of the obligation giving rise to the debt (Br. at 20). A rule which precludes such an analysis is inconsistent with the intent of Congress and is at odds with the goal of the statute, which is to provide immunity for foreign sovereigns for their "public" acts.

D. The Relevant Contextual Factors In This Case Distinguish Argentina's Conduct From Activity In Which Private Parties Engage

The relevant contextual factors in this case, as articulated by Petitioners (Br. at 23-24) and conceded by the Government (Gov't Br. at 16), are as follows:

- Argentina's need to fulfill its FEIC obligations
- Argentina's need to conserve foreign exchange
- The Bonods raised no capital
- The Bonods did not finance *any* government acquisitions
- The Bonods were issued without receiving commensurate consideration

The Government and Respondents attempt to avoid any consideration of these factors, contending that they shed no light on the "nature" of the activity, but rather go only to its "purpose." As discussed *supra*, however, that formalistic distinction simply is neither useful nor warranted. Indeed, the Government's own response to each of these factors reveals the lack of merit in the Government's position.

While the first factor identifies the nature of the obligation being refinanced and the second factor explains the reason

Argentina created the Bonods, both illustrate, as the Government concedes, that Argentina undertook this activity "for purposes other than those that motivate a private party" (Gov't Br. at 16). More importantly, the latter three factors clearly go not to the "purpose" of the activity, but to its nature.

In other words, these facts—that the Bonods raised no capital, did not finance goods or services or any government acquisition, and were issued without the exchange of consideration in any customary since—shed light not on why the conduct took place: they tell us *what* took place, and how. That is the key to understanding the character, or nature, of the transaction. It is undisputed in this case that private parties do not and would not undertake to engage in this or similar conduct under these circumstances, or to incur debt with these characteristics: that is the quintessential test for distinguishing sovereign from commercial activity.

II. THE ACT DOES NOT PROVIDE FOR OR PERMIT A RULE THAT THE NON-PAYMENT OF A DOLLAR-DENOMINATED DEBT DESIGNATED TO BE PAID IN THE UNITED STATES ALWAYS CAUSES A "DIRECT EFFECT" HERE

The Government and the Respondents urge the Court to find a "direct effect" in the United States, and therefore jurisdiction under the Act, whenever an instrument or transaction is denominated in dollars and contemplates the United States as a place of payment, even where the parties claiming a loss have no discernible connection to the United States (Gov't Br. at 11, 25; Resp. Br. at 17-18). Such an approach, however, would make meaningless the express statutory requirement that the effect be both "in the United States" and be "direct." Moreover, the proposed test would result in a stunning extension of federal court jurisdiction that would confer jurisdiction on the courts of this country over any action when the United States is designated as a contractual place of payment and the debt is denominated in dollars.

A. Neither The Act Nor Its Legislative History Indicates That The Designated Place Of Payment Is Dispositive Of The Direct Effect Inquiry Or That Denomination In Dollars Has Any Jurisdictional Relevance

The factor urged by the Government and the Respondents as dispositive of the direct effect question—the place of payment of the debt which gives rise to a lawsuit—is nowhere mentioned by Congress as determinative of FSIA jurisdiction. Congress clearly was capable of drafting such a provision—either by referring specifically to debt or by reference in general to place of performance—had it intended automatically to extend jurisdiction on that basis. The Government, however, points to no language in the Act or in the legislative history that requires or supports this result.

To the contrary, the legislative history is replete with references to a desire to assure that "American citizens" and "U.S. businessmen" have access to the courts when necessary to resolve disputes arising from their dealings with foreign governments engaged in commercial activities. *See House Report*, *supra*, at 6-7; *House Hearings*, *supra*, at 24-25. Moreover, as the Government acknowledges,[11] a principal concern of Congress when the Act was passed was that the courts of the United States not be turned into " 'international courts of claims.' " *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (quoting *House Hearings*, *supra*, at 31). While Congress permitted the class of permissible plaintiffs under the FSIA to include non-United States citizens, *id.* at 490, it also ensured that the Act protect against the internationalization of federal courts by " 'requiring some form of substantial contact with the United States.' " *Verlinden*, 461 U.S. at 490.[12]

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11 *See* Gov't Br. at 19 n.13.

12 In *Verlinden*, the Court reserved decision on the question of whether failure to pay a foreign corporation in this country causes a direct effect in the United States. *Verlinden*, 461 U.S. at 498 & n.23.

The proposed jurisdictional rule flies in the face of these considerations, because it invites foreign parties to bring suit in the United States even where—as here—the underlying transaction was not negotiated in the United States, the debt instrument at issue was issued in another country, and there is no actual financial loss in the United States. As Judge Kaufman noted in *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), "the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss," because a corporation, unlike a natural person, can only suffer financial loss and no other kind of injury. Respondents, which have no discernible presence in this country, can hardly be said to have suffered a "direct" financial loss here. *See Carey* v. *National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).[13]

The preoccupation of the Government with the dollar-denomination of foreign state debt is likewise misplaced, and has the same fatal flaw: it virtually ensures that jurisdiction will be extended under the Act to disputes that have no connection whatsoever with this country save the fact that they involve dollars, the transfer of which may take place in this country. This prospect is all the more certain because "the U.S. dollar is the leading international currency, used in more than half of all international payments in the world." FRANKLIN R. ROOT, INTERNATIONAL TRADE AND INVESTMENT 292 (6th ed. 1990) (hereinafter INTERNATIONAL TRADE). On a daily basis, billions of dollars of wholly foreign transactions take place in New York as an electronic

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13 The circuit court also relied extensively on the perceived "effect" of a decision to decline jurisdiction on the status of New York as an international financial center (Pet. App. A at 13a-14a). Not only is the existence of such an effect debatable, *Verlinden B. V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983), but as Judge Weinfeld wrote in rejecting this argument, the "effect visited not upon the plaintiff but upon a constituency of unnamed strangers to this lawsuit, is at most speculative and remote." 488 F. Supp. at 1298.

"place of payment" through the Clearing House Interbank Payments System (CHIPS) noted by the Government (Gov't Br. at 23 n.19). *See* INTERNATIONAL TRADE, *supra*, at 291. It is likely that a significant number of these are connected to New York only by this instantaneous dollar transmission, yet jurisdiction presumably would be present under the proposed rule.[14]

B. The Proffered Rule Creates A Forum Selection Clause Not In The Parties' Agreement

The Government-Respondents' rule also would result in converting a clause which designates New York as one of four possible places of payment into an agreement by a sovereign to submit to the jurisdiction of New York in a suit by anyone who happens to select New York as a place of payment. Indeed, they suggest that this is a virtue of their approach since it provides greater predictability for sovereigns entering into what are determined to be commercial arrangements (Gov't Br. at 19-20; Resp. Br. at 12). The sovereign defendants here, however—and sovereigns generally—had the ability to accomplish this predictability for themselves if it was perceived to be an advantage. They deliberately chose not to do so. The Bonods, in contrast to other similar instruments (*see* J.A. 108-109 (promissory note)), con-

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14 An actual example of how CHIPS works illustrates this conclusion: (1) At 7 A.M. in Paris, a French vintner receives an order from a British importer for champagne to be bought with U.S. dollars. (2) At 9 A.M., the vintner orders its London warehouse to deliver the champagne to the importer. It does so. (3) At 12 noon, the importer instructs its London bank to pay the French vintner in U.S. dollars. (4) At 1 P.M., the London bank advises its New York office to pay. (5) At 3 P.M., payment is sent via CHIPS to the New York office of the vintner's French bank. (6) At 4 P.M., the French bank's New York office tells its Paris office that it has received payment. (7) At 6 P.M., the Paris bank pays the vintner.

INTERNATIONAL TRADE, *supra*, at 291. Were the agreed place of payment to be New York in this example, the proposed direct effect test would impose jurisdiction over this otherwise wholly foreign dollar transaction.

tain no forum selection or submission to jurisdiction language whatsoever.

The Respondents also argue that by offering New York as one of several payment locations, Petitioners "led investors to believe . . . that they could rely on the laws and, if necessary, the courts of those countries" (Resp. Br. at 16). The Government likewise contends that Petitioners' inclusion of a New York payment option rendered the Bonods more attractive to investors "because they were not subject to the currency exchange limitations and other laws that might restrict repayment elsewhere" (Gov't Br. at 25). These arguments, too, simply seek to convert a place of payment provision into a choice of forum clause which is not present in the Bonod, but which is present in the promissory notes which others negotiated as an alternative to the Bonods.[15] *Cf. Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 566 F. Supp. 1440, 1442 (S.D.N.Y. 1983) (finding personal jurisdiction based upon the parties' inclusion of a choice of forum clause in their agreement), *rev'd on other grounds*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985).

There is nothing in the language or history of the Act which justifies engrafting these jurisdictional effects on a choice of payment provision. Moreover, they cannot create a direct effect in the United States where the holder of the Bonod is a non-U.S. entity. Indeed, as discussed above, the "direct effect" requirement was designed to assure that the United States courts did not become magnets for litigation by every conceivable type of foreign plaintiff against foreign

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15 These arguments also rest on an assumption that New York law would govern any litigation on the merits of this action, a ruling that never has been made in this case and which is belied by the face of the Bonods themselves. The text of each Bonod clearly references sections of three Argentine Presidential Decrees and no less than five separate Banco Central communications implementing the underlying Argentine law with respect to these instruments. In addition to the printed version included in the Joint Appendix (J.A. 20-27), a reproduction of a sample Bonod may be found in the record at pp. 43-46 of the Joint Appendix filed in the circuit court.

sovereigns, unless the alleged conduct at issue had some substantial relationship with the United States.

C. The Proposed Rule Is Inconsistent With Traditional Principles Of Long-Arm Jurisdiction

As discussed above, even if the activity at issue is deemed to be commercial, the FSIA by its express language does not provide the necessary jurisdictional basis for this case to proceed in a United States court.[16] In the opening brief Petitioners argued that the legislative history of the Act demonstrates that Congress did not intend the nexus requirements of Section 1605 to be interpreted so as to provide jurisdiction where traditional principles of long-arm jurisdiction would not do so. In response, the core of the argument advanced by the Respondents and the Government is that jurisdiction should rest on the fact that New York was designated as a place of payment for the Bonods. Place of payment alone, however, rarely supports long-arm jurisdiction (*see* Br. at 32-35).[17] While the Government and the Respondents express skepticism on this point, they offer no convincing authority to the contrary.[18]

Moreover, while the Government strains to find additional United States "contacts" by Petitioners in connection with the failure to pay here (Gov't Br. at 23), what the Government points to simply are the mechanical *means* for making payment: these necessary ministerial mechanisms add nothing to the agreement to pay here. *See Verlinden B. V.* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd*

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16 If a sovereign is entitled to immunity under the FSIA there is neither subject matter nor personal jurisdiction in the United States. 28 U.S.C. § 1330 (a) and (b).

17 *See also, e.g., American Recreation Group, Inc.* v. *Woznicki*, 448 N.Y.S.2d 51 (App. Div. 1982); *Hubbard, Westervelt & Mottelay, Inc.* v. *Harsh Bldg. Co.*, 284 N.Y.S.2d 879 (App. Div. 1967).

18 In the only two cases cited by Respondents, the forum state—Kansas—had an interest in adjudicating the dispute since the obligations at issue were owed to Kansas residents (*see* Resp. Br. at 17).

on other grounds, 647 F.2d 320 (1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

Finally, in responding to Petitioners' constitutional analysis the Respondents and the Government also attempt to create the appearance of broader United States contacts by pointing to the perceived attractiveness of New York to investors, in terms of its political stability and efficient financial and currency markets, that allegedly arose from the selection of New York as a possible place of payment. Not only is there no support in the record for these propositions, but these factors in any event would not provide a basis for jurisdiction.[19] That is because these hypothesized benefits, offered as examples of the privileges allegedly derived by Petitioners here, simply are not the types of factors that have served as the basis for minimum contacts determinations in this Court.[20] In fact, these are the very type of factors that the Court has ruled are *not* relevant to a due process minimum contacts analysis in other contexts. *See, e.g., Shaffer* v. *Heitner*, 433 U.S. 186, 215-216 (1977).

In requiring substantial lawsuit-related United States contacts by the foreign sovereign before jurisdiction properly can be exercised under the FSIA, Congress did not intend to reach the outer limits of what would be constitutionally permissible (Br. at 28-35). As the foregoing demonstrates and as

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19 Respondents reject Petitioners' discussion of the due process limits of the Act's reach by characterizing it as an improper "attempted merger of subject matter and personal jurisdiction" (Resp. Br. at 15). As the Court noted in *Verlinden*, however, "both statutory subject-matter jurisdiction . . . and personal jurisdiction turn on application of the substantive provisions of the Act." 461 U.S. at 480 n.5. The starting point for statutory construction is to presume that Congress intends that its legislation operate within limits imposed by the Constitution, and thus these principles are a further guide to the intended reach of the statute. *See Federal Communications Commission* v. *Pacifica Foundation*, 438 U.S. 726, 742 n.17 (1978) ("Congress never intends to exceed constitutional limits").

20 *See, e.g., Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985) (finding of purposeful availment based, *inter alia*, upon presence of plaintiff and negotiation, execution and provision for enforcement of contract in forum).

set forth in Petitioners' opening brief, however, interpreting the jurisdictional reach of the statute to extend to the acts of Petitioners would exceed the due process limits of the Constitution (Br. at 35-39). As noted by the Court in *Burger King Corp.* v. *Rudzewicz*, a contract between a forum state resident and a foreign party, standing alone, is not a sufficient forum contact upon which to rest jurisdiction. 471 U.S. 462, 478 (1985). The contact is even more tenuous, and the forum has less of an interest in hearing the dispute, where the plaintiff also is a stranger to the forum. Under the circumstances of this case, which must further take into account the unique burdens imposed by the exercise of jurisdiction over a foreign sovereign nation, the extension of jurisdiction would not be reasonable, or permissible. *See Asahi Metal Industry Co.* v. *California Superior Court*, 480 U.S. 102, 114-15 (1987). The direct effect requirement thus should not be read to reach the claims in this case.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the decision of the court of appeals should be reversed, and the Complaint in this action should be dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA, PETITIONERS

v.

WELTOVER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act bars a foreign creditor's suit against a foreign state alleging that the state breached a contractual obligation to repay government bonds that are payable in New York and denominated in United States currency.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Petitioners, the Republic of Argentina and its Central Bank, challenge the court of appeals' determination that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, does not bar a civil suit brought by respondents, a Swiss bank and two Panamanian corporations, alleging that petitioners have breached their contractual obligation to repay government bonds issued to refinance private commercial debt. The United States has a twofold interest in this matter.

First, this Court's interpretation of the FSIA has an obvious and substantial impact on the United States' conduct of foreign relations. Second, the United States has a substantial interest in the operation of the international public debt market. That market (which includes

publicly-traded debt securities that are subject to federal securities laws) involves trillions of dollars, and its operation affects the economies of numerous nations throughout the world, the work of international financial organizations, and the financial positions of many private sector lending institutions and investors, as well as relations between the United States and other countries.

STATUTORY PROVISIONS INVOLVED

Section 1605(a) of the FSIA states in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a).

Section 1603 of the FSIA provides in relevant part:.

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

STATEMENT

1. *The Foreign Sovereign Immunities Act*

The FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 443 (1989). Enacted in 1976, the FSIA was intended to provide the courts with objective criteria to determine whether suits against foreign states could proceed. The FSIA replaced the prior ad hoc approach in which the courts deferred on jurisdictional issues to the Executive Branch's desires in light of foreign policy objectives. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-488 (1983).

The FSIA gives the United States district courts original subject matter jurisdiction over nonjury civil actions against a foreign state, including suits by foreign plaintiffs, as to claims for relief with respect to which the foreign state is not entitled to immunity under Sections 1605 through 1607 of the FSIA. 28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489. The FSIA further provides that the district courts shall have personal jurisdiction over the foreign state as to those claims where service of process has been made in accordance with the FSIA. 28 U.S.C. 1330(b).

The crucial inquiry is the scope of the foreign state's immunity. Section 1604 of the FSIA states the general rule:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. 1604. Sections 1605 through 1607 provide exceptions to that general rule that essentially codify the "restrictive" principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487-488. Under the restrictive

immunity principle, foreign nations and their instrumentalities can be sued in "cases arising out of a foreign state's strictly commercial acts," but not for actions "involving the foreign sovereign's public acts." *Id.* at 487.[1]

Section 1605(a) of the FSIA states that a foreign state is not entitled to immunity if, among other things, the foreign state waives it, 28 U.S.C. 1605(a)(1), or if the state engages in commercial activity having a prescribed nexus to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is based upon:

> (i) "a commercial activity carried on in the United States by the foreign state";[2]
>
> (ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
>
> (iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[3]

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[1] Prior to the enactment of the FSIA, the United States Department of State had espoused the restrictive immunity approach, which was followed by "almost every country in Western Europe." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8-9 (1976). See Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to the Attorney General (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711 (1976). The FSIA adopted the restrictive principle and further provided—in accordance with the practice followed in "virtually every country"—that the courts, rather than a "foreign affairs agency," would make the immunity determination. H.R. Rep. No. 1487, *supra*, at 9.

[2] The FSIA defines this phrase to mean "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. 1603(e).

[3] Section 1605(a) identifies other cases—such as certain types of property-based actions, personal injury actions, and arbitration

The FSIA instructs that, in determining if an activity is commercial, the courts are to look to the "nature" of the conduct rather than to its "purpose." 28 U.S.C. 1603(d). Thus, "the FSIA resolves the classic hypothetical of a foreign state's purchase of equipment for its armed forces: Such purchases are regarded as commercial in nature, notwithstanding their public purpose." G. Born & D. Westin, *International Civil Litigation in United States Courts* 363 (1989). See H.R. Rep. No. 1487, *supra*, at 16.

2. *The Financial Transactions at Issue*

Like the lower courts, we rely on the facts as alleged in the respondents' complaint (J.A. 6-12) and as set forth in affidavits filed in the pretrial proceedings (J.A. 13-19, 155-157). See Pet. App. 17a n.2. According to those sources, the Republic of Argentina and its citizens engaged in extensive borrowing during the late 1970s and became deeply indebted to foreign creditors that were entitled to repayment in an internationally recognized currency, such as United States dollars. Argentina's massive foreign debt, coupled with other substantial economic problems, led to devaluation of the Argentine currency (formerly the peso and currently the austral) with respect to the dollar. Pet. App. 2a-3a, 17a; J.A. 15-16.

The devaluation of Argentina's currency imposed a significant burden on Argentina's private debtors, who needed dollars to repay their foreign debts and could obtain those dollars only by exchanging their local currency. Argentina, through its Central Bank (Banco Central), therefore initiated a Foreign Exchange Insurance Contract (FEIC) program to help stabilize the exchange rate for its private debtors. The FEIC program was intended to protect private Argentine debtors from cur-

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proceedings—where a foreign state is not entitled to immunity. See 28 U.S.C. 1605(a)(3), (4), (5) and (6). Those provisions of the FSIA are not relevant here.

rency devaluations by allowing those debtors to purchase dollars at the then-current exchange rate for future repayment of foreign debts. Under this program, the debtor paid a fixed amount of local currency to Banco Central in advance of the maturity date of the foreign debt. Banco Central agreed, in turn, to provide the dollars necessary to repay the foreign debt when it matured. Pet. App. 3a, 17a; J.A. 16.

Argentina's economy continued to deteriorate. By the autumn of 1982, the Argentine government's foreign exchange reserves were insufficient to meet its obligations under the FEIC contracts to supply dollars to Argentine private debtors for payment of their debts. It therefore used new financial instruments—government bonds (known as Bonods) and promissory notes—to refinance the obligations of the Argentine private debtors. Under this refinancing program, the Argentine government gave a foreign creditor the option of accepting Bonods in satisfaction of the initial private debt—thereby substituting Argentina itself as the debtor—or maintaining the debt with the private Argentine debtor but accepting Bonods as guarantees for payment of the debt. The Bonods pay principal and interest only in United States dollars, with interest to be based on the London Interbank rate for Eurodollar accounts. Argentina provided that payment could be made in any of four locations—New York, London, Frankfurt, or Zurich—as designated by the creditor (the holder of the Bonods). Pet. App. 4a, 17a-18a; J.A. 25.[4]

Argentina's Central Bank issued Bonods in an aggregate principal amount of $1.3 billion. The Bonod pro-

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[4] The Bonods read in pertinent part: "They shall be paid by BANCO CENTRAL DE LA REPUBLICA ARGENTINA in United States Dollars through transfer on the New York, Frankfurt, London or Zurich markets, at the option of the bondholder, to the credit of the account opened to his name, which he shall specify at the time of subscription or [transfer], 30 days before the time of each service." J.A. 25.

gram, however, did not succeed as planned. Argentina's economic conditions worsened. In May 1986, soon after the initial interest payments on the Bonods were made, the Republic determined that it could not meet its foreign debt obligations. The Argentine government directed Banco Central unilaterally to extend the time for payments on the Bonods, thereby rescheduling the debts. Argentina notified the United States Department of the Treasury of that action. Pet. App. 4a, 18a-19a; J.A. 18.[5]

3. *The Proceedings Below*

According to the allegations in their complaint, respondents—a Swiss Bank and two Panamanian corporations—hold Bonods with an aggregate principal amount of approximately $1.3 million. They allege that petitioners designated agents in New York for administration and payment of the Bonods, that petitioners made some interest payments to respondents' New York bank accounts before the rescheduling, that respondents refused to accept the rescheduling, and that petitioners breached their repayment obligation under the terms of the Bonods. Pet. App. 2a, 16a; J.A. 6-12.

Respondents filed this action in the United States District Court for the Southern District of New York and invoked that court's jurisdiction under the FSIA. Respondents asserted that the district court had jurisdiction over the matter on two alternative grounds: (1) the

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[5] The complaint alleges that Bonods were issued to institutions located in the United States. J.A. 7. The affidavits, however, do not address that matter, and we do not believe it is relevant in this case. Nevertheless, we note, for the Court's information, that the United States Export/Import Bank (a wholly-owned United States government corporation) has informed us that Bonods were issued to private creditors in the United States, and a significant number of them eventually were transferred to that institution as part of its foreign trade guarantee functions. The Export-Import Bank no longer has physical possession of its Bonods. They were surrendered to Argentina after a payment rescheduling was negotiated between the United States and Argentine governments.

action was based on a commercial activity within the meaning of Section 1605(a)(2) of the FSIA; and (2) petitioners had waived, either expressly or implicitly, their immunity under Section 1605(a)(1) of the FSIA. J.A. 7.

Petitioners appeared and moved to dismiss the suit for lack of jurisdiction, claiming that respondents' action did not fall within either of those FSIA exceptions to immunity. The district court denied petitioners' motion, ruling that respondents' suit was contained within the third clause of the commercial activity exception—the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2).

The district court concluded that petitioners' issuance of financial instruments to satisfy private debts "fall[s] squarely within the parameters of what private commercial entities do" and was "a quintessentially commercial act." Pet. App. 21a. The court rejected petitioners' argument that their issuance of the Bonods was a "sovereign activity" designed to alleviate Argentina's debt crisis and to implement the nation's currency control regulations. The court explained that "the plain language of the FSIA" requires a court "to look to the nature of the act, and not its purpose." *Id.* at 21a-22a. It next concluded that the failure to pay a debt made payable in the United States—even if the debt is owed to a foreign creditor—causes a "direct effect in the United States." *Id.* at 23a-24a.[6]

The court of appeals affirmed. It agreed with the district court that an activity is "commercial" for purposes of the FSIA if it is conduct that a private party might engage in for profit, even if the foreign nation is motivated by concerns other than profit. Pet. App. 7a-8a. It

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[6] The court found no need to reach the issue whether petitioners had waived their immunity. Pet. App. 19a n.4. The court also rejected petitioners' argument that respondents' action should be dismissed for lack of personal jurisdiction, *id.* at 24a-27a, and under the doctrine of forum non conveniens, *id.* at 27a-29a.

further stated that a court must "isolate the specific conduct that underlies the suit, rather than focusing on 'the broad program or policy of which the individual transaction is a part.'" *Id.* at 8a. The court also agreed that the primary focus, for purposes of the FSIA, must be on the "nature" of the activity rather than on its "purpose": "When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome." *Id.* at 9a.

The court of appeals concluded that the nature of the relevant activity here—"the issuance of debt instruments"—is an activity that private parties engage in for profit and is "clearly commercial." Pet. App. 9a, 10a. The court also ruled that the activity had an adequate United States nexus for purposes of the FSIA. It concluded that "[b]ecause [petitioners'] breach of the Bonod agreement deprived [respondents] of their contractual rights to receive payment in U.S. dollars, [petitioners'] acts caused a direct effect to [respondents]." *Id.* at 12a. Furthermore, "the act of nonpayment caused a direct effect in the United States" because:

> The legally significant act was [petitioners'] failure to abide by the contractual terms; *i.e.*, to make payments in New York. The effects occurred, in the first instance, in New York, when the [respondents'] accounts were not credited with the outstanding amount of U.S. dollars.

Id. at 14a. The court of appeals also gave weight to the United States' interest in maintaining New York's status as a financial center. *Ibid.*

SUMMARY OF ARGUMENT

Section 1605(a)(2) of the FSIA states in relevant part that a foreign state is not immune from suit in any case in which the action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that

act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). The lower courts correctly concluded that Section 1605(a)(2) denies petitioners immunity in this action, where respondents have alleged that a foreign state breached a contractual obligation to make payment on debt instruments that can be held by private creditors, are payable in New York, and are denominated in United States currency.

Petitioners are mistaken in asserting that respondents' suit is not based on an act "in connection with a commercial activity of the foreign state." 28 U.S.C. 1605(a)(2). The issuance of debt instruments that can be held by private creditors is a commercial activity. Petitioners' reliance on the assertedly "sovereign" purpose in issuing the debt instruments—to alleviate a monetary crisis and to benefit the Argentine economy—is misplaced. The FSIA expressly states that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d).

Petitioners are also mistaken in asserting that their unilateral rescheduling of payments did not have a "direct effect in the United States." 28 U.S.C. 1605(a)(2). Petitioners do not dispute that they undertook a contractual obligation to make principal and interest payments in New York using United States currency. The court of appeals correctly concluded that petitioners' rescheduling of payments had the direct effect of breaching their performance obligation in this country.

In short, the FSIA, applied according to its plain terms, does not extend immunity to a foreign state in a suit that is based on the state's alleged breach of an obligation to make payments on debt instruments that can be held by private creditors, are payable in the United States, and are denominated in United States currency. Additionally, a specific ruling to that effect would provide

clear guidance to foreign states, as well as lending institutions and investors, in determining a foreign state's amenability to suit in this country.

ARGUMENT

A FOREIGN STATE IS NOT IMMUNE IN A UNITED STATES COURT FROM A CIVIL ACTION ALLEGING THAT THE STATE HAS BREACHED ITS OBLIGATION TO REPAY ON A DEBT INSTRUMENT THAT CAN BE HELD BY A PRIVATE CREDITOR, IS PAYABLE IN THE UNITED STATES, AND IS DENOMINATED IN UNITED STATES CURRENCY

The FSIA provides a straightforward answer to the question whether petitioners are immune from respondents' breach of contract action. Petitioners' issuance of debt instruments that can be held by private (nongovernmental) creditors is a "commercial activity" within the meaning of the FSIA. See 28 U.S.C. 1603(d). Their subsequent rescheduling of the contractual obligations set forth in those debt instruments is an act "in connection with" that activity that "causes a direct effect in the United States," 28 U.S.C. 1605(a)(2), because it breaches their contractual obligation to pay a dollar-denominated debt in New York. The FSIA accordingly subjects petitioners to suit in a United States court. Petitioners' challenges to the "commercial" nature of their activity and the "direct effect" of their debt rescheduling are unpersuasive, given the language and design of the FSIA. The result they urge would replace a clear, reasonable, and workable rule with an uncertain ad hoc inquiry. That sort of inquiry is undesirable in cases involving the commercial activity exception to foreign sovereign immunity, where foreign states and private creditors need clear guidance in determining the legal consequences of their dealings.

A. A Foreign State's Issuance of Debt Instruments That Can Be Held by Private Creditors Is a "Commercial Activity"

Petitioners contend that their issuance of Bonods was not "commercial activity" within the meaning of Section 1605(a)(2) of the FSIA. That contention, however, is at odds with the definition that Congress provided. Congress stated that a "commercial activity" means "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. 1603(d). Congress's repetition of the term "commercial" in its definition indicates that Congress intended that term to retain its general meaning, which denotes a relationship or connection to "trade and traffic or commerce." *Black's Law Dictionary* 245 (5th ed. 1979). As the Second Circuit observed, the courts of appeals have generally applied a "pragmatic approach" in evaluating the commercial nature of a foreign state's undertakings. Pet. App. 7a.[7]

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[7] The Department of State's Legal Adviser, in testimony supporting enactment of the FSIA, identified the underlying rationale for focusing on the "commercial" nature of the activity:

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach * * *.
>
> The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976) (testimony of Monroe Leigh). The House Report on the bill explained:

> [S]ection 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral

Petitioners' issuance of Bonods is just such a commercial activity. The Argentine Bonod is a certificate of indebtedness under which petitioners promise to pay the holder a specified amount of interest for a specified length of time, and to repay the loan on the expiration date. See J.A. 20-25. It is, in short, no different in its essential terms from a bond that might be issued by a business corporation in the private sector. The issuance of such debt instruments, like the issuance of promissory notes, mortgages, and commercial paper, is by its nature a commercial activity. See, *e.g.*, *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) ("It is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2).").[8]

Petitioners argue that reading the FSIA according to its plain terms results in an inappropriate per se rule that issuance of public debt is commercial activity. Pet. Br. 14-17.[9] They rely on the FSIA's legislative history,

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> extraction company, an airline or a state trading corporation. Certainly, if the activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

H.R. Rep. No. 1487, *supra*, at 16.

[8] Although the foreign government debt securities at issue here do not appear to have been publicly offered in the United States or listed for trading on a United States national exchange, foreign debt is regularly distributed in public offerings in the United States over-the-counter and on national exchanges. Foreign government debt securities are subject to the registration, disclosure and civil liability provisions of the federal securities laws. See generally Greene & Adee, *The Securities of Foreign Governments, Political Subdivisions, and Multinational Organizations*, 10 N.C. J. Int'l L. Com. Reg. 1 (1985). Indeed, defaults on foreign government bonds and abuses in the sale of such securities were significant considerations in the enactment of federal securities laws. See *ibid.*; L. Loss & J. Seligman, *Securities Regulation* 743-758 (3d ed. 1989).

[9] We are not urging such a broad rule. For example, bilateral lending transactions between central banks of two states may not

which shows that an unenacted version of the FSIA contained a provision that would have preserved a foreign state's immunity in cases "relating to debt obligations incurred for general governmental purposes." See H.R. 11315, 94th Cong., 2d Sess. § 1606 (1976) (*reprinted in* 122 Cong. Rec. 33,533 (1976)); see also S. 3553, 94th Cong., 2d Sess. § 1606 (1976) (*reprinted in* 122 Cong. Rec. 17,463 (1976)). Petitioners, however, draw the wrong conclusion from Congress's deletion of that provision from the enacted bill.

Petitioners argue, based on excerpts from the House Report explaining the change, that Congress's intention in deleting the public debt exception was to allow the courts to examine debt instruments on a case-by-case basis. The full passage from the House Report does not support that assertion. The Report states:

> Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606. *The public debt provision was, at best, very limited.* It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific governmental projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. *Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would*

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necessarily constitute commercial activity. Such transactions, however, would likely differ substantially in form and terms from the present situation, which involves the issuance of debt instruments that can be held by private creditors.

> *be subject to U.S. regulation, such as that provided by the securities laws.* Thus, on reconsideration of all of the factors, the *committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.*

H.R. Rep. No. 1487, *supra*, at 10 (emphasis added). This passage indicates that the drafters removed the "very limited" public debt exception because, among other reasons, the issuance of a debt instrument is an activity "of a commercial nature." *Ibid.* See also *id.* at 16 (describing a foreign state's "borrowing of money" as an example of a commercial activity); Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 Am. J. Int'l L. 399, 405 (1977).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 442-443 (1987). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). Thus, Congress's deletion of the provision granting immunity based on actions "relating to debt obligations" bolsters the conclusion that petitioners are not entitled to immunity in connection with their issuance of the Bonods.[10]

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[10] Petitioners' reliance on the unenacted public debt exception is misplaced, in any event, because it is doubtful that the Bonods at issue here would have been encompassed within that exception. Petitioners issued the Bonods in substitution for or as a guarantee of a privately incurred debt and not for a "general governmental purpose[]." See J.A. 17. Additionally, petitioners are mistaken in relying on pre-FSIA law to assert that issuance of debt instruments is not a commercial activity. See Pet. Br. 15-16. The FSIA superseded that law and it thus cannot alter the plain effect of the FSIA's provisions. Similarly, petitioners are mistaken in attempting to import and apply non-FSIA principles governing federal and state immunity. Pet. Br. 17. The Court's role here is to interpret the FSIA in accordance with its express terms.

3. Petitioners also contend that their issuance of the Bonods must be "analyzed in context" to determine whether it is commercial activity. Pet. Br. 17-24. Specifically, petitioners argue that the court should have taken into account that the Bonods were issued

> to fulfill [Argentina's] obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange.

Id. at 23-24. Additionally, petitioners argue that the court should have considered that the Bonods "raised no capital," "were not the mechanism for financing trade or acquisitions by a government entity" and were issued "without receiving consideration commensurate with their value in any customary sense." *Id.* at 24.

At bottom, petitioners simply invite the Court to evaluate the character of their Bonod issuance by reference to its purpose. The FSIA, however, plainly states:

> The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. 1603(d). The first two factors that petitioners assert are relevant—petitioners' need to fulfill its FEIC obligations and to conserve foreign currency—simply explain the governmental purpose that motivated petitioners to issue the debt instruments. Likewise, the remaining three factors—the debt instruments raised no capital, did not finance government acquisitions, and were issued without commensurate consideration—even if true, simply illustrate that the government incurred the contractual obligation for purposes other than those that motivate a private party. A foreign state can put forth such arguments in virtually any case of issuance of public debt to private creditors or investors. The FSIA plainly states

that those factors do not alter the otherwise commercial character of an activity.[11]

To be sure, the court of appeals stated that there may be circumstances where the "nature" of an activity cannot be determined without some reference to its "purpose." Pet. App. 9a. Whatever the validity of that observation in the abstract, it does not come into play here. As the court of appeals stated: "When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome." *Ibid.* That is the case where a foreign state issues a bond or other instrument of debt that can be held by a private creditor.

B. A Foreign State's Rescheduling of Debt Payments Causes a "Direct Effect in the United States" if It Breaches a Contractual Obligation To Repay Dollar-Denominated Obligations in the United States

Petitioners contend that their unilateral rescheduling of their debt obligations did not "cause[] a direct effect in the United States." Pet. Br. 28-40. They argue that the "effect" in this case is insufficient because: the plain-

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[11] The House Report is consistent with that conclusion:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

H.R. Rep. No. 1487, *supra*, at 16. Petitioners concede that the FSIA confers no immunity when a foreign state enters into a contract to obtain boots for its army, notwithstanding its purpose of promoting the national defense. Pet. Br. 22 n.17. Similarly, the FSIA confers no immunity when a foreign state enters into a contract to refinance private debts (in effect, to obtain foreign currency) notwithstanding its public purpose of promoting the national economy.

tiffs here are foreign creditors (*id.* at 26-27); the dispute has an insufficient relationship to the United States (*id.* at 28-32); the effects here would be insufficient to support long-arm jurisdiction in a domestic case (*id.* at 32-35); and assertion of personal jurisdiction in this case would violate the Due Process Clause (*id.* at 35-40). Those arguments are unpersuasive.

As the court of appeals correctly concluded, the rescheduling of the debt obligations "cause[d] a direct effect in the United States" because it breached a contractual obligation to pay a debt denominated in dollars that was payable in the United States. The place where there is a legal obligation to repay a debt is a matter of central importance in debtor-creditor relationships, because it is the place of performance of the contractual obligation. It is especially important in the case of international transactions, which can be subject to currency exchange restrictions. In the case of dollar denominated transactions, New York (or another international banking center in the United States) is frequently designated as a place of performance specifically because it provides a commercial forum where a dollar-based transaction can be completed without encountering currency restrictions, such as those that existed in Argentina, that limit the availability of foreign currency. See J.A. 15.

Petitioners do not dispute that the Bonods, by their terms, are legally payable (at the option of the holder) at four major locations where dollar-denominated transactions can be made (New York, Frankfurt, London, or Zurich); that respondents elected payment in New York; or that the debt instruments imposed a legal obligation to pay the debt there. See Pet. Br. 9, 25.[12] Under the

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[12] Petitioners do not contend here, nor did they contend below, that the provisions in the Bonods designating New York as a place of payment were mere remittance instructions for a debt that they are legally obligated to pay at some other location. Compare *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1124 (5th Cir. 1985). Nor do they contend that governing law would make the Bonods legally

facts alleged in the complaint, petitioners' act of rescheduling its debt payments (which we assume occurred outside the United States) breached that obligation and therefore caused a direct effect in the United States.

Petitioners are mistaken in arguing that there was no direct effect in the United States because the creditors are not citizens of the United States and the injury to their interest would be felt elsewhere. Pet. Br. 26-27. As petitioners later acknowledge, "the residence of the plaintiff in the forum is not a requirement for the assertion of jurisdiction over a foreign defendant." *Id.* at 39 n.37. Indeed, this Court has specifically held that the FSIA allows "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied." *Verlinden*, 461 U.S. at 489.[13]

Petitioners' suggested approach, which would require a court to ascertain the "effect" of a foreign state's act by examining the place where the "economic loss [is] suffered" (Pet. Br. 26) would provide an intractable standard for resolving the jurisdictional question. A foreign state would be unable to assess its immunity from suit at the time the debt is issued or thereafter. It is far more sensible to determine a foreign state's amenability

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payable elsewhere. Compare *United States* v. *First Nat'l City Bank*, 321 F.2d 14, 20-22 (1963) (describing the "separate entity" rule, under which a bank deposit at a foreign branch is legally payable only at that branch), aff'd en banc, 325 F.2d 1020 (2d Cir. 1964), rev'd on other grounds, 379 U.S. 378 (1965). Cf. *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, petition for cert. pending, No. 91-689 (filed Oct. 24, 1991).

[13] Congress was aware of the danger that foreign parties might attempt to convert the courts of the United States into "international courts of claims," Pet. Br. 29, but it "protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some sort of substantial contact with the United States." *Verlinden*, 461 U.S. at 490. See also *id.* at 490 n.15 (noting the availability of forum non conveniens dismissal).

to suit by a foreign creditor through a commercially relevant criterion that is fixed by the terms of the agreement or by governing law—the place where the debt is legally payable.

Petitioners are also mistaken in arguing that the transaction has an insufficient connection with the United States. Pet. Br. 28-32. First, petitioners' alleged refusal to pay their debt has more than a "general effect" (*id.* at 26-27) in this country. As we have explained, it results in the breach of their duty to perform a contractual obligation here. As the court of appeals correctly recognized, the breach of a prescribed duty is a specific, legally significant event. See Pet. App. 13a. See, *e.g.*, *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988); *L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F. Supp. 114, 121-122 (S.D.N.Y. 1988).

Petitioners similarly are mistaken in contending that there was no "substantial" or "foreseeable" effect in the United States. Pet. Br. 29-32.[14] The FSIA does not by its terms require that the "direct effect" be substantial and foreseeable. In this respect, the third clause of Section 1605(a)(2) contrasts with the first clause, for which Section 1603(e) specifies the need for "substantial

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[14] Petitioners derive those considerations from a statement in the House Report, which provides that the "direct effects" requirement "would embrace commercial conduct abroad having direct effects within the United States which would subject conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." H.R. Rep. No. 1487, *supra*, at 19. Section 18, which actually deals with the extraterritorial application of United States law, provides that such application is permissible if the "effect within the territory is substantial" and it "occurs as a direct and foreseeable result of the conduct outside the territory." See Pet. App. 11a. See also Restatement (Third) of the Law, Foreign Relations Law of the United States § 421(2)(j) (1986) (providing that a state may exercise jurisdiction to adjudicate where, among other things, an entity has "carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state").

contact" with the United States. Nevertheless, if substantiality and forseeability were regarded as providing the criteria for a "direct effect," those criteria are satisfied here. The breach is a "substantial" effect in the legally relevant sense because the place of payment is central to performance of a contractual debt obligation, and the failure to pay there denies the creditor the benefits to which he is contractually entitled.[15] Furthermore, a breach in the United States was foreseeable in light of the fact that New York is the designated place of performance. Petitioners' inquiry into whether respondents have suffered a "substantial financial loss" (Pet. Br. 30) would involve the courts in unpredictable ad hoc inquiries into the magnitude and location of a financial injury.[16]

Petitioners argue that subjecting them to suit in this context is inconsistent with "traditional principles of 'long arm jurisdiction.'" Pet. Br. 32-35. They rely on the "paradigm" in which

> a borrower, without leaving its own state, enters into a transaction with a lender from another state, payable at the lender's place of business, and the

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[15] The United States favors enforcement of contracts in accordance with their terms in the context of sovereign debt restructurings. See *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-522 (2d Cir.), cert. dismissed, 473 U.S. 934 (1985).

[16] Petitioners correctly observe (Pet. Br. 31) that subject matter jurisdiction over extraterritorial violations of the federal securities laws may be based on an act causing injuries to United States investors or having an adverse impact on the market of a security traded in the United States. See, *e.g.*, *Des Brisay* v. *Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206, modified on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). The absence of such effects, however, is not dispositive of whether a foreign state's act has caused "a direct effect in the United States." 28 U.S.C. 1605(a)(2). Notably, the relevant injury or impact in the securities law context typically stems from tortious conduct rather than breach of a contractual obligation.

> lender subsequently attempts to sue the borrower in the state of lender's place of business.

Id. at 32. Petitioners contend that the "prevailing view" (*id.* at 33) is that the exercise of long arm jurisdiction is inappropriate unless "the underlying transaction also had a significant forum state connection." *Id.* at 32-33, citing 2 R. Casad, *Jurisdiction in Civil Actions* § 8.02, at 8-38 to 8-39 (2d ed. 1991). The treatise they cite is less definitive on this point than the assertions in their brief.[17] In any event, the "paradigm" they use—the case of a domestic borrower who "does not leave his own state"—does not aptly describe the case of a foreign sovereign. But most importantly, international transactions that are payable in a particular forum and in the currency of that forum have a significant—and frequently essential—connection to that forum.

The designation of a place of payment has special implications, both legal and practical, in the case of international transactions. As a legal matter, the parties must select a location that allows for settlement of the debt free, to the extent possible, from political risk, currency exchange restrictions, and other limitations that might affect repayment.[18] As a practical matter, the parties

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[17] The treatise states:

> An examination of the cases in which the note in suit was executed outside the forum state indicates clearly that execution of the note in the forum state is not necessary to long-arm jurisdiction over the maker. Many cases have upheld long-arm jurisdiction over the maker of a note that was executed outside, but was payable in the forum state. In most of those cases, however, the underlying transaction also had a significant forum state connection.

2 R. Casad, *supra*, § 8.02, at 8-37 to 8-38 (footnote omitted).

[18] Foreign states frequently assert dominion over debts that are to be repaid in their territory. See generally Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594 (1986). That element of "sovereign risk" can influence the parties' choice of the appropriate place of payment, as well as the substantive law of other affected states. For example, the Federal

must select a forum that has a sufficient supply of the relevant currency and effective mechanisms for settling the debt. As mentioned above, New York is ofen designated as the place of payment in the case of dollar-denominated transactions.[19]

Petitioners issued dollar-denominated debt instruments payable in New York. Thus, they purposefully availed themselves of the benefits of the United States forum, which presumably increased the attractiveness and value of their debt instruments. Moreover, they took other purposeful steps, such as the appointment of a financial agent in New York, J.A. 8, and the establishment of the necessary correspondent bank accounts, to facilitate the transactions. Thus, the situation here is a far cry from the mere "nonreceipt of payment in New York maildrop bank accounts." Pet. Br. 31. Rather, petitioners' issuance of dollar denominated debt in which New York was designated as the place of payment was a conscious and deliberate choice from which they obtained substantial benefits.

Finally, petitioners are incorrect in asserting that an interpretation of the FSIA subjecting petitioners to suit in the United States would "exceed constitutional due process limits." Pet. Br. 35-40. Petitioners acknowledge that "[w]hether there is a constitutional basis for personal jurisdiction over [them] is not before the Court

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Reserve Board's regulations recognize that "[a] customer who makes a deposit that is payable solely at a foreign branch [of a United States bank] assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. 204.128(c).

[19] The Federal Reserve Bank of New York can provide access to ample United States currency to satisfy commercial transactions. Additionally, the Federal Reserve Bank and the New York Clearing House Association, through its Interbank Payment System (CHIPS), provide the necessary mechanisms for clearing and settling the relevant transactions. See generally Lingl, *Risk Allocation in International Interbank Electronic Fund Transfers: CHIPS & SWIFT*, 22 Harv. Int'l L. J. 621 (1981).

as an independent question." Pet. Br. 36 n.33.[20] The Due Process Clause is implicated only indirectly here: the House Report on the FSIA indicates that the FSIA embodies the "requirements of minimum jurisdictional contacts and adequate notice." H.R. Rep. No. 1487, *supra*, at 13.

As petitioners recognize, the "minimum contacts" test is intended to ensure that maintenance of the suit in the forum state "does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). That test is satisfied where, as here, a foreign state breaches a contractual obligation to repay government bonds that are payable in New York and denominated in United States currency. This Court's decision in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), identifies the controlling principle. The critical inquiry is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 474. Thus, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 475.

Assuming that the FSIA's provisions embody the "minimum contacts" requirement, there can be little doubt

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[20] Significantly, this Court has never held that a foreign state is a "person" for purposes of the Due Process Clause. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."); but see, *e.g.*, *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981) (holding that a foreign state is a "person" for purposes of the Due Process Clause), cert. denied, 454 U.S. 1148 (1982). Cf. *Verlinden*, 461 U.S. at 486 ("foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.").

that that test is met in this case. Petitioners "purposefully avail[ed]" themselves of the privilege of conducting activities in the United States when they issued bonds that are payable in New York and denominated in United States currency. As we have explained, petitioners obtained substantial benefits from that deliberate, unilateral decision. Their debt instruments became more attractive (and hence more valuable), because they were not subject to the currency exchange limitations and other laws that might restrict repayment elsewhere. Petitioners' conduct and connections with New York are sufficiently concrete, and the resulting benefits sufficiently substantial, that they should have reasonably anticipated being haled into court there.[21]

In sum, we believe that the governing rule should be this: A foreign state is not immune from suit in United States courts based on the breach of a contractual obligation to repay on a debt instrument that can be held by a private creditor, is payable in the United States, and is denominated in United States currency. That clear and cogent rule is not only consistent with the FSIA, but it would provide definitive guidance to foreign states in structuring their debt offerings and determining their amenability to suit in this country.

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[21] This Court's decision in *Burger King* indicates that, when a court evaluates a constitutional claim, it may also take into account additional factors to ensure that the assertion of personal jurisdiction will "comport with 'fair play and substantial justice.'" 471 U.S. at 476. See also *Asahi Metal Industries Co.* v. *Superior Court*, 480 U.S. 102, 113-116 (1987). Petitioners do not suggest that such an inquiry is necessary here. Indeed, Congress itself has weighed such factors in formulating the "commercial activity" exception. It has determined that a foreign state should be answerable "in any case * * * in which the action is based upon * * * an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). If petitioners' acts fall within the terms of the statutory language, then that should be the end of the matter.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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